THE HUMAN RIGHT TO WATER: A LEGAL COMPARATIVE PERSPECTIVE AT THE INTERNATIONAL, REGIONAL AND DOMESTIC LEVEL

JIMENA MURILLO CHÁVARRO

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Promotor: Prof. Frank Maes

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PROLOGUE

This thesis summarises the history of the human right to water and examines its main content and the obligations that derive from this right. The main purpose of the recognition of the human right to water is to guarantee to everyone access to sufficient, safe and affordable drinking water to satisfy personal and domestic uses. This thesis discusses whether the human right to water is recognised as a derivative right or as an independent right at three levels – at universal, regional and domestic law - where human rights are acknowledged and enforced. For national law a case study approach has been used with focus on Argentina, Bolivia, Chile and Colombia.

Additionally, the human right to water is examined in a transboundary water context, where the use and management of an international watercourse in one riparian state can directly or indirectly affect the human right to water in another riparian state. For this reason, this thesis analyses whether the core principles of international water law can be used as a tool to contribute to the realisation of the extraterritorial application of the right to water.

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Deze thesis vat de geschiedenis samen van het mensenrecht op water en onderzoekt haar belangrijkste inhoud en de verplichtingen die eruit voorvloeien. Het hoofddoel van de erkenning van het mensenrecht op water is om iedereen toegang te garanderen tot voldoende, veilig en betaalbaar drinkwater om aan persoonlijk en huishoudelijk gebruik te voldoen. Deze thesis bespreekt of het mensenrecht op water als een afgeleid of als een onafhankelijk recht wordt erkend en toegepast op drie niveaus: in het universeel, regionaal en nationaal recht. Voor het nationaal recht wordt gebruik gemaakt van een casusbenadering met aandacht voor de volgende landen: Argentinië, Bolivia, Chili en Colombia.

Bijkomend wordt het mensenrecht op water onderzocht in een grensoverschrijdende watercontext, waar het gebruik en beheer van een internationale waterweg in één oeverstaat het mensenrecht op water direct of indirect kan beïnvloeden in een andere oeverstaat. Om deze reden analyseert deze thesis of de basisprincipes van het internationaal waterrecht kunnen worden gebruikt als een middel om uitvoering te geven aan de extraterritoriale toepassing van het recht op water.

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CONTENTS

LIST OF ABBREVIATIONS

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
African Charter	African Charter on Human and Peoples' Rights
African Commission	African Commission on Human and Peoples' Rights
American Convention	American Convention on Human Rights
ASEAN	Association of Southeast Asian Nations
CEDAW	Committee on the Elimination of Discrimination against Women
CESCR	Committee on Economic Social and Cultural Rights
CFA	Cooperative Framework Agreement
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment
CRC	Committee on the Rights of the Child
CRPD	Committee on the Rights of Persons with Disabilities
CSW	Commission on the Status of Women
ECOSOC	Economic and Social Council
ESC rights	Economic, social and cultural rights
ECtHR	European Court of Human Rights
European Convention	Convention for the Protection of Human Rights and Fundamental Freedoms
HRC	Human Rights Council
HRCom	Human Rights Committee
IAComHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
IBWC	International Boundary and Water Commission
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights

ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILA	International Law Association
ILC	International Law Commission
MDGs	Millennium Development Goals
OAS	Organisation of American States
OAU	Organization of African Unity
OHCHR	United National High Commissioner for Human Rights
OP-ICESCR	Optional Protocol of the International Covenant on Economic Social and Cultural Rights
UNDHR	Universal Declaration of Human Rights
UN Charter	Charter of the United Nations
UNECE	Office of United Nations Economic Commission for Europe
UNECED	United Nations Conference on Environment and Development
UNECE Water Convention	Convention on the Protection and Use of Transboundary Watercourses and International Lakes
UNGA	United Nations General Assembly
UN Watercourse Convention	Convention on the Law of the Non-navigational Uses of International Watercourses
WHO	World Health Organisation

TABLE OF CASES AND OTHER MATERIALS

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Decreto 195 (adopted 19 February 1998) Aprueba Reglamento de la Ley No 18.778, que Establece Subsidio al Pago de Consumo de Agua Potable y Servicio de Alcantarillado de Aguas Servidas, published in the Diario Oficial on 17 July 1998.

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Ley 18.885 (adopted 15 December 1989) Autoriza al Estado para desarrollar actividades empresariales en material de agua potable y alcantarillado, y dispone la constitución de sociedades anónimas para tal efecto, published in the Diario Oficial on 12 January 1990.

Ley 18.902 (adopted on 8 January 1989) Crea la Superintendencia de Servicios Sanitarios, published in the Diarion Oficial on 27 January 1990.

Ley 19.549 (adopted 19 January 1998) Modifica el Régimen Jurídico Aplicable al Sector de los Servicios Sanitarios, published in the Diario Oficial on 4 February 1998.

Colombia

Colombian Constitution (promulgated on 4 July 1991) published on the Gaceta Consituticional No. 114 on 7 July 1991 and Gaceta Constitucional No. 116 on 20 july 1991.

Decreto 2591 de 1991 (adopted el 10 de November de 1991) por el cual se reglamenta la acción de tutela consagrada en el artículo 86 de la Constitución Política, published in the Diario Oficial No. 40.165, 19 November 1991.

Ley 142 de 1994 (adopted on 11 July 1994) por la cual se establece el régimen de los servicios públicos domiciliarios y se dictan otras disposiciones, published in the Diario Oficial No. 41.433, 11 July 1994.

Ley 472 de 1998 (adopted on 5 August 1998) por la cual se desarrolla el artículo 88 de la Constitución Política de Colombia en relación con el ejercicio de las acciones populares y de grupo y se dictan otras disposiciones, published in the Diario Oficial No. 43.357, 6 August 1998.

Medellin

Acuerdo 06 de 2011, 'por medio del cual se institucionaliza el programa mínimo vital de agua potable', (adopted on 13 April 2011, by the Municipal Council of the city of Medellin, Antionquia).

Bogota

Decreto 485 de 2011 (adopted on 3 de November 2011 by the designated Mayor of Bogota).

Decreto 1889 de 2001, por medio del cual se reglamenta el Acuerdo 06 de 2011 'por medio del cual se institucionaliza el Programa Mínimo Vital de Agua Potable' (Adopted on 1 November 2011 by the Mayor of Medellin).

Bolivia

Bolivian Constitution (adopted on 25 January 2009 by referendum) published in the Gaceta Oficial on 7 February 2009.

Decreto Supremo 0071 (adopted 9 April 2009) Crea las Autoridades del Estado Plurinacional en Extincion de las Superintendencias, published in the Gaceta Oficial on 14 April 2009.

Decreto Supremo 24716 (adopted 22 July 1997) Aprueba Reglamento de la Organización Institucional y de las Concesiones del Sector de Aguas y el Reglamento de Uso de Bienes de Dominio Público y de Servidumbres para Servicios de Aguas, publsihed in the Gaceta Oficial on 24 July 1997.

Ley 027 (adopted 6 July 2010) Ley del Tribunal Constitucional Plurinacional, published in the Gaceta Oficial on 6 July 2010.

Ley 1600 (adopted 28 October 1994) del Sistema de Regulation Sectorial (SIRESE), published in the Gaceta Oficial on 28 October 1994.

Ley 2029 (adopted 22 October 1999) Ley de Servicios de Agua Potable y Alcantarillado Sanitario, published in the Gaceta Oficial on 9 December 1999,

Ley 2066 (adopted 11 April 2000) Ley de Prestación y Utilización de Servicios de Agua potable y Alcantarillado Sanitario, published in the Gaceta Oficial on 17 April 2000

Ley 2410 (adopted 8 August 2002) Ley de Necesidad de Reformas de la Constitución Política del Estado, published in the Gaceta Oficial on 2 August 2002.

Ley 2878 (adopted 8 October 2004) Ley de Promoción y Apoyo al Sector Riego, published in the Gaceta Oficial on 21 October 2004.

Resolución Administrative Regulatoria AAPS 81/2012 (adopted 26 December 2012) Tarifa Solidaria a Nivel Nacional.

Resolución Administrativa Regulatoria AAPS 180/2011 (adopted 11 April 2011) Categoria social solidaria.

Resolución Ministerial 510 (adopted 29 October 1992, published 29 October1992) Reglamento Nacional de Prestación de Servicios de Agua Potable y Alcantarillado para Centros Urbanos.

CHAPTER I

1. GENERAL INTRODUCTION

Water resources are used for a large number of societal activities, such as agriculture, industry, recreation and human consumption, as well as energy production. Additionally, water is necessary for the survival of all other living things. We might think that we have enough water on Earth to accomplish all these activities since there are large quantities of this resource on the planet. However, the majority of societal activities require freshwater resources, which only represent a small percentage of that large amount of water on Earth. In fact, only 2.5% of the world's water is fresh; the remainder - 97.5% - is seawater (saline water) and undrinkable. In addition, the greater portion of freshwater resources (approximately 68.7%) is found on ice and permanent snow in the Antarctic, the Arctic and in the mountainous regions. Further, 29.9% of freshwater is found in groundwater, and only 0.26% of the total amount of freshwater is concentrated in lakes, rivers and reservoirs.[1] This last percentage represents the amount of water that is easily available for the listed societal activities. As a result, these activities have become competing uses for limited water resources.

Freshwater resources are unevenly distributed on the planet. While water is abundant in some regions, in other regions it is extremely scarce.[2] People living in areas where water is scarce may face difficulties in fulfilling their essential needs, since water is necessary to maintain life and good health, and to produce food. Therefore, access to sufficient safe drinking water is indispensable for all human beings to survive. In certain places available drinking water is becoming dangerously low and in other places water is highly polluted and not suitable for human consumption. Climate change is expected to make some arid areas even drier. In coastal areas, sea levels rising increase the potential for the intrusion of saline water into fresh groundwater in coastal aquifers. Additionally, water stored in glaciers and snow cover are projected to decline due to climate change, thus reducing water availability during dry periods in regions supplied by melt water.[3] Despite the necessity of water for all human beings and the programmes that have been

[1] Igor A. Shiklomanov, 'World Water Resources. A New Appraisal and Assessment for the 21st Century' (1998) United Nations Educations, Scientific and Cultural Organisation UNESCO, 4 <http://www.ce.utexas.edu/prof/mckinney/ce385d/Papers/Shiklomanov.pdf> accessed 8 August 2013.

[2] Peter. H. Gleick, 'Water and Conflict: Fresh Water Resource and International Security', 18 (1) International Security 79 (1993).

[3] Bryson Bates, Zbigniew W. Kundzewicz and Shaohong Wu (eds), 'Climate Change and Water' (IPCC Technical Paper VI) (Intergovernmental Panel on Climate Change, Geneva 2008) 3-4, 43 <https://www.ipcc.ch/pdf/technical-papers/climate-change-water-en.pdf> accessed 10 December 2013.

implemented around the world, particularly in the last decade, about 768 million people still lack access to safe drinking water.[4]

Mindful of the uneven distribution of water resource throughout the world, the increasing competition among water uses, and worsening water pollution, world leaders and experts in different fields began discussing the need to recognise access to water as a basic human right about four decades ago.

The human right to water should be recognised to guarantee sufficient amounts of safe drinking water to everyone. Nonetheless, its recognition has been controversial due to the consequences that this right may have in different spheres. For instance, such recognition might mean that water used for human consumption should have preference among other competing water uses, or it might create legal obligations for states towards their inhabitants or towards other states, or it might adversely affect private water providers and water bottling companies.

For the purpose of this study, the human right to water should be understood as the right of sufficient and safe drinking water to satisfy basic human needs, including, drinking, cooking, and personal and household hygiene (such as taking a shower, brushing teeth, washing hands and clothes, and food preparation). This right does not include water uses for agriculture, industry or hydropower. The right to water implies having access to water resources, as well as not being deprived of its use. Drinking water should be of good quality and safe for human consumption, not presenting a risk to the health or life of individuals. Also this right should be guaranteed to everyone, including children, women, men, people with disabilities, and indigenous people regardless of their socio-economic position, sex, religion, age or nationality.

The objective of this study is to explore whether there is a recognised human right to water and, if so, under what conditions it exists, particularly focusing on the fields of human rights law and international water law. This study aims to further examine whether a human right to water is recognised at the international, regional and domestic level, and the manner in which this right has been recognised. In other words, the study will examine whether access to safe drinking water is considered a derivative or stand-alone human right. For the purpose of this study, the section concerning state practice (domestic level) has been limited to four South American countries: Argentina, Bolivia, Chile and Colombia. In case the human right to water can be considered as a stand-alone right, this study aims to explore the main elements that compose this right, as well as the obligations that are derived from it.

[4] See --'Progress on Sanitation and Drinking-Water 2013 Update', (World Health Organization and UNICEF 2013) 8 <http://www.wssinfo.org/fileadmin/user_upload/resources/JMPreport2013.pdf> accessed 3 October 2013; --, 'The Millennium Development Goals Report 2013', (United Nations, New York 2013) 47 <http://www.un.org/millenniumgoals/pdf/report-2013/mdg-report-2013-english.pdf> accessed 7 October 3013.

The human right to water is a particular right that requires one essential element: freshwater. But this resource is finite and internationally shared. Worldwide, there are approximately 300 rivers, 100 lakes and a number of aquifers shared by two or more states.[5] As a result, the fate of this human right more than any other right in the current catalogue is inextricably tied directly to the action and inaction of foreign actors, such as riparian states, thereby undermining the role of a domestic state acting alone.[6] This is why we will examine whether extraterritorial obligations derive from the human right to water and whether international water law can contribute to the realisation of this right in a transboundary context.

1.1. Research questions

This study seeks to answer two core research questions: whether and in what ways the human right to water is recognised in human rights law and international water law; and whether the human right to water can be extraterritorially applied.

For the first research question, this study focuses on the recognition of a human right to water in contemporary international law. This is done by exploring and assessing the relevant history of access to water as a human right, and consequently by examining and defining the main content of the human right to water. Next to the recognition of a human right to water, the obligations that are to derived from this right will be legally assessed.

Since the acknowledgement and enforcement of human rights take place at three levels - international, regional and domestic - the first question requires a legal analysis and response at those levels. Thus, the following research questions are to be solved at each level.

a) Is the human right to water recognised in international, regional and national law? If so, is it acknowledged as a stand-alone right or a derivative right?
b) If the right to water is recognised as a derivative right, which human rights incorporate the right to water?

Based on the answers to the above questions, this study will also examine whether the human right to water would be better protected as a stand-alone right or as a derivative right, taking into account the legal status of this right in the legal sources under study.

[5] Salman M.A. Salman, 'The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspective on International Water Law' (2007) 23 (4) Water Resource Development 638.
[6] Takele Soboka Bulto, Towards Rights-Duties Congruence: Extraterritorial application of The Human Right to Water in the African Human Rights System, 29(4) Netherlands Quarterly of Human Rights 496-497 (2011).

Furthermore, this study will focus on the extraterritorial application of the human right to water. It is considered that economic, social and cultural rights can create national and international obligations for states. Given that water resources are internationally shared and that their use and management can have a positive or negative impact in riparian states sharing the same watercourse, this study will examine whether international water law may conflict with the realisation of the human right to water. Conversely, it will examine whether international water law can or need to be used as a tool to support such a right in a transboundary watercourse context.

1.2. Methodology

The methodology of this study consists of doctrinal, qualitative and comparative legal research. It is based on the legal analysis of treaties, state practice, and case law, supplemented with soft law and literature, at three levels: international, regional and national.

At the international level, the following conventions are studied: the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Convention on the Elimination of All forms of Discrimination against Women; the Convention on the Rights of the Child; and the Convention on the Rights of Persons with Disabilities. The interpretations of these legal provisions were primarily done with the aid of subsidiary sources, such as *travaux préparatoires* of the mentioned international conventions, recommendations, General Comments, and (quasi) judicial decisions of UN human rights treaty bodies. The research also covers declarations, resolutions, and statements adopted by bodies of the United Nations, generally considered as soft law. Customary international law is also relevant.

At the regional level the legal analysis focuses on the conventions adopted by the different regional organisations that promote respect for human rights, including: the American Convention on Human Rights, the American Declaration of the Rights and Duties of Man, the European Convention on Human Rights, the European Social Charter, the European Convention on the Prevention of Torture and Inhumane and Degrading Treatment or Punishment, the African Charter on Human and Peoples' Rights, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the African Charter on the Rights and Welfare of the Child, the Human Rights Declaration of the Association of Southeast Asian Nations (ASEAN) and the Arab Charter on Human Rights. Additionally, judgments and decisions adopted by regional human rights bodies, such as the Inter-American Commission on Human Rights, the Inter-American Court of Human rights, the European Court of Human Rights, The European Committee of Social Rights, the African Commission and the African Committee of Experts on the Rights and Welfare of the Child, are also analysed.

At the national level, four South American countries are studied. Argentina, Bolivia, Chile and Colombia have been selected in order to examine state practice in more detail. These countries were chosen taking into account the manner in which they recognise or fail to recognise, the human right to water. Bolivia enshrines the human right to water in its Constitution. Colombia and Argentina do not explicitly included this right in their Constitutions, but the jurisprudence of both countries has dealt with the issue. Chile considers water as merchandise and strongly encourages the privatisation of drinking water services. The national constitution and legislation adopted in each of the four states are scrutinised in order to determine whether the human right to water has been explicitly recognised. Moreover, the judgments of the Colombian Constitutional Court, the Bolivian Constitutional Tribunal, the Chilean Supreme Court, Chilean Courts of Appeals, and different judicial bodies in Argentina are also analysed with the purpose of understanding how the human right to water is implemented in practice.

For the last section of this study a doctrinal and cross-sectorial approach is undertaken with the purpose of examining whether the fields of international water law and human rights law conflict or, on the contrary, are interconnected and mutually supportive. The sources of international water law used in this study focus on the Convention on the Law of the Non-navigational Uses of International Watercourses and the Berlin Rules on Water Resources.

1.3. Structure of the study

This study is divided in six chapters. The first chapter serves as a general introduction. The second chapter deals with the emergence of the human right to water. It explains who started discussing about the recognition of this right, why those discussions began, and how awareness and acknowledgment of this right was strengthened. Next, it focuses on the definition and main elements that compose the human right to water. The third chapter examines the recognition of the human right to water at the international level. It explores the implicit and explicit recognition of access to drinking water in the different international human rights conventions. It also examines how access to drinking water is implemented through the reporting procedure and the complaint mechanisms established in international human rights conventions. Since this study has a particular focus on four South American countries, the reporting procedure on the implementation of international human rights conventions is centred on the state reports of those countries. The fourth chapter considers whether the human right to water has been recognised by the regional organisations that work to promote and protect human rights. There, the study assesses if the human right to water has been codified into regional human rights instruments. Case-law of the main regional bodies charged with examining compliance by states are analysed to find out whether and under what circumstances access to safe drinking water is guaranteed by those bodies. The fifth

chapter uses a case study approach to analyse the recognition of the human right to water at the domestic level. There we examine whether Argentina, Bolivia, Chile and Colombia have recognised the human right to water, and if so, how this right is implemented in practice. The sixth chapter examines the extraterritorial application of the human right to water. It explores the enjoyment of the human right to water in a transboundary context and its relationship with international water law. Finally, the seventh chapter draws conclusions based on the preceding chapters.

CHAPTER II

2. EMERGENCE, DEFINITION AND CORE CONTENT OF THE HUMAN RIGHT TO WATER

2.1. Introduction

Water is an essential element for life; a minimum intake of water is necessary for human survival. Every human being needs to drink a minimum amount of water to prevent death from dehydration, and water is also necessary for other basic needs, such as sanitation, personal and house cleaning, and food production, among others. [7]

According to the World Health Organization (WHO) about 768 million people still do not have access to improved sources of drinking-water,[8] 2.5 billion people lack access to improved sanitation[9] and about 2 million annual deaths[10] are attributable to the use of unsafe water and sanitation. Access to improved water sources refers to household connections, public taps or standpipes, boreholes, protected wells or springs, and methods of rainwater collection. Unimproved sources include vendors, tanker trucks, unprotected wells and springs, as well as surface water (rivers, dams, lakes, ponds, streams, canals, or irrigation channels).[11]

Despite the fact that water is a limited natural resource and a public good fundamental for life and health, a human right to water started to develop recently in international human rights law, and in the constitutional sphere of some states. A number of statements, declarations, resolutions and even international conventions have recognised water as an essential element necessary to satisfy basic human needs. The following subsection contains a descriptive evolution of the recognition of the emerging human right to water at the international level. This chapter also examines the main elements that compose this right, as well as the state's obligations that derive from it.

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[7] Peter H. Gleick, 'Basic Water Requirements for Human Activities: Meeting Basic Needs' (1996) 21 Water International 84 <http://www.pacinst.org/reports/basic_water_needs/basic_water_needs.pdf> accessed 28 July 2012.

[8] World Health Organization and UNICEF, 'Drinking Water: Equity, Safety and Sustainability', (2011) 11 <http://www.wssinfo.org/fileadmin/user_upload/resources/report_wash_low.pdf> accessed 6 December 2012. See also The World Bank, 'Improved water source (% of population with access)', <http://data.worldbank.org/indicator/SH.H2O.SAFE.ZS> accessed 5 December 2012.

[9] --, *Progress on Sanitation and Drinking-Water: 2013 Update* (World Health Organization and UNICEF, France 2013) 3, 5, 8.

[10] World Health Organization, and Water Sanitation and Health (WSH), 'Facts and Figures on Water Quality and Health', <http://www.who.int/water_sanitation_health/facts_figures/en/index.html> accessed 10 September 2013.

[11] --'Drinking Water. Equity, Safety and Sustainability' (UNICEF and World Health Organization, 2011) 11 <http://www.wssinfo.org/fileadmin/user_upload/resources/report_wash_low.pdf> accessed 10 November 2013.

2.2. Emergence of the human right to water

Since the end of the 1960's scientists, politicians and experts in different fields started to realise the fundamental relationship between humans and the environment. They also realised the emerging problems from the scarcity of some natural resources, such as the limited quantities of water resources in certain areas of the world or during certain periods of the year. Since then, the importance of access to water has been recognised in declarations, action plans, agendas, statements, treaties and resolutions. The way the right to water has emerged in different spheres will be discussed in a chronological evolution.

The first use of water to be regulated at the international level was navigation at the beginning of the 19th century. However, a growing population and the industrial revolution resulted in the use of rivers for non-navigational purposes, such as hydropower, industry, irrigation and domestic uses.[12] Since the different uses of water in one state could affect the freshwater resources of other states, for instance by diminishing the quantity or quality of this resource, the need to manage watercourses from an international perspective became evident.

The first international document that discussed the use and management of international watercourses was a compilation of the customary international norms, known as the Helsinki Rules on the Uses of the Waters of International Rivers (hereinafter the Helsinki Rules)[13], adopted in 1966 by a non-governmental organisation of legal experts, the International Law Association (hereinafter ILA). The Helsinki Rules adopted the principle of 'Equitable and Reasonable Utilisation', which means that each basin state is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin.[14] This principle aims to balance the different competing uses that can exist within the same river basin, particularly between upstream and downstream states. In order to determine what a reasonable and equitable use is, a number of relevant factors must be considered; among these factors are the economic and social needs of each basin state and the population dependent on the water in each basin state.[15] These two factors clearly reflect the use of water to satisfy human basic needs or domestic needs.

The Helsinki Rules did not give preference to a particular factor. In fact, the Helsinki Rules established that a use or category of uses is not entitled to any inherent preference

[12] Knut Bourquian, *Freshwater Access from a Human Rights Perspective, a Challenge to International Water and Human Rights Law* (Martinus Nijhoff Publishers, Leiden 2008) 23; Salman M.A. Salman, 'The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspective on International Water Law' (2007) 3 (4) Water Resources Development 626.

[13] The Helsinki Rules on the Uses of the Waters of International River, adopted by the International Law Association at the fifty-second conference, held at Helsinki in August 1966. International Las Association (ILA), The Helsinki Rules on the Uses of International Rivers, Report of the Fifty-Second Conference held at Helsinki in 1966.

[14] Helsinki Rules, Article IV.

[15] Helsinki Rules, Article V (5) (6).

over any other use or category of uses.[16] The absence of a preference for the use of water to satisfy basic human needs was reasonable, since at the time of the adoption of the Helsinki Rules there was not yet a concern regarding lack of access to water.

At the United Nation Conference on the Human Environment, held in Stockholm in June 1972, international environmental issues were discussed for the first time. The Declaration adopted as an outcome of the Conference, expressed a growing concern over man-made harm in many regions of the world, particularly dangerous levels of pollution in water, air, soil and species.[17] Principle 2 of this Declaration states that the natural resources on Earth, including water, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.[18]

In 1977, the United Nations Water Conference held in Mar del Plata, Argentina, was devoted exclusively to the discussion of emerging water problems. It was at this Conference that for the first time safe drinking water and sanitation was declared a right. Resolution II on 'Community Water Supply' adopted at this Conference declared that '*[a]ll peoples, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs*'.[19] The Mar del Plata Action Plan indicated as a priority area that *'[a]ction must focus on promoting (a) increased awareness of the problem; (b) commitment of national Governments to provide all people with water of safe quality and adequate quantity and basic sanitation facilities by 1990, according priority to the poor and less privileged and to water scarce areas…'.*[20]

In 1979, with the adoption of the Convention on the Elimination of All Forms of Discrimination against Women,[21] the first explicit reference to water in an international convention appeared. Article 14 (4) of this Convention, addressing the rights of rural women, provides that states should ensure the right '*to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications*'.

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[16] Helsinki Rules, Article VI.

[17] United Nations Environment Programme, Declaration of the United Nations on the Human Environment, para 3 <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=97&ArticleID=1503&l=en> accessed 15 September 2012.

[18] UN Environment Programme, Declaration of the United Nations on the Human Environment, Principle 2.

[19] UN Water Conference, "Report of the UN Water Conference, Mar del Plata 14-25 March 1997," (1997) E/CONF.70/29, 66.

[20] UN Water Conference, "Report of the UN Water Conference, Mar del Plata 14-25 March 1997," (1997) E/CONF.70/29, 68.

[21] Convention on the Elimination of All forms of Discrimination against Women (adopted on 18 December 1979, entered into force on 3 September 1981) 1249 UNTS 13.

As a measure to implement the Mar del Plata Action Plan[22], in 1980 the UN General Assembly proclaimed the period from 1981 to 1990 as the International Drinking Water Supply and Sanitation Decade. During this period, states assumed a commitment to bring about a substantial improvement in the standards and levels of services in drinking water supply and sanitation.[23] According to the United Nations Water Conference Resolution VIII, the Economic and Social Council (ECOSOC), the Committee on Natural Resources, and the Regional Commissions in the respective regions play an important role in the promotion of intergovernmental co-operation as a follow-up to the implementation of the Action Plan.[24]

In 1989 with the adoption of the Convention on the Rights of the Child[25] a second explicit reference to water was made. Article 24 of this Convention stipulates that '*provision of adequate food and clean drinking water*' are among the measures that states need to take to combat diseases and malnutrition, as part of their implementation of the right to health.

While progress on the implementation of the Mar del Plata Action Plan and the achievement of the International Drinking Water Supply and Sanitation Decade were being reviewed by ECOSOC,[26] plans for the United Nations Conference on Environment and Development (UNCED) were made. As part of the preparation for this event, an international conference on water and the environment was organised by the World Meteorological Organisation, on behalf of the UN, with programmes in fresh water.[27] As a result, the International Conference on Water and the Environment was held in Dublin, Ireland, in January 1992. During this conference tools to reduce the trend towards water shortage were discussed. It was thought that if water was considered a commodity, the wasteful uses of the resource and its pollution could be reduced. The outcome of this conference was the adoption of the Dublin Statement, which proclaims four principles.[28] Principle 4 states that water has an economic value in

[22] ECOSOC, Resolution 1979/31 (adopted at the fourteen plenary meeting on 9 May 1979) on the International Drinking water Supply and sanitation Decade, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NR0/766/58/IMG/NR076658.pdf?OpenElement> accessed 20 May 2013.
[23] UNGA, Resolution on the Proclamation of the International Drinking Water Supply and Sanitation Decade (10 November 1980) UN Doc. A/RES/35/18.
[24] See UN Water Conference, "Report of the UN Water Conference, Mar del Plata 14-25 March 1979," Vol. 1, (1979) E/CONF.70/29, 78. Also ECOSOC Resolution 1979/67 (adopted at the Fortieth Plenary meeting on 3 August 1979); ECOSOC Resolution 1979/68 (adopted at the Fortieth Plenary meeting on 3 August 1979)
[25] Convention on the Rights of the Child (adopted on 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.
[26] See UN Water Conference, "Report of the UN Water Conference, Mar del Plata 14-25 March 1979," Vol. 1, (1979) E/CONF.70/29, 78. Also ECOSOC Resolution 1979/67 (adopted at the Fortieth Plenary meeting on 3 August 1979); ECOSOC Resolution 1979/68 (adopted at the Fortieth Plenary meeting on 3 August 1979).
[27] UNGA 'Natural Resources, Energy and Cartography' (1992) UNYB 476.
[28] The Dublin Statement on Water and Sustainable Development (Adopted on January 31, 1992, in Dublin, Ireland, Conference on Water and the Environment). Principle 1. Fresh water is a finite and vulnerable resource, essential to sustain life, development and the environment; Principle 2. Water

all its competing uses and should be recognised as an economic good. It was also mentioned within this principle that '*it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price*'.[29]

Subsequently, during the UNCED held in June 1992 in Rio de Janeiro, Brazil, a number of documents were adopted: the Rio Declaration, the Framework Convention on Climate Change, the Convention on Biological Diversity, the Statement of Forest Principles, and Agenda 21. The latter is a programme of action demanding new ways to reach sustainable development in the 21st century.

In particular, Chapter 18 of Agenda 21 is dedicated to the protection of the quality and supply of fresh water resources. The general objective for freshwater resources is '*to make certain that adequate supplies of water of good quality are maintained for the entire population of this planet…* '[30] It is also mentioned that '*water resources have to be protected, taking into account the functioning of aquatic ecosystems and the perenniality of the resource, in order to satisfy and reconcile needs for water in human activities. In developing and using water resources, priority has to be given to the satisfaction of basic needs and the safeguarding of ecosystems*'.[31] Once more, Agenda 21, in its Chapter 18, recognises the essential function of water to satisfy basic human needs and the priority that has to be given to this use. Chapter 18 also states that safe water supply and environmental sanitation are vital for improving health and alleviating poverty. In addition, it endorses the Resolution of Mar del Plata, which states that all people have the right to access drinking water in qualities and of a quantity equal to their basic needs, and named this 'the commonly agreed premise'.[32]

In 1996, on the initiative of renowned water specialists and international organisations, the World Water Council, an international multi-stakeholder platform, was established in response to an increasing awareness about water issues.[33] Today, this platform has a large number of members, including intergovernmental organisations, governmental authorities, enterprises and facilities, as well as academic institutions.[34] Since 1997, every three years the World Water Council organises the World Water Forum to reach a common strategic vision on water resources and water services management among all

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development and management should be based on a participatory approach, involving users, planners and policy-makers at all levels; Principle 3 Women play a central part in the provision, management and safeguarding of water, <http://www.un-documents.net/h2o-dub.htm> accessed 20 September 2012.

[29] The Dublin Statement on Water and Sustainable Development. Principle 4.

[30] Agenda 21, The United Nations Programme of Action (Adopted at the Conference on Environment and Development, June 1992). Chapter 18, para 18.2.
<http://sustainabledevelopment.un.org/content/documents/Agenda21.pdf> accessed 7 January 2013.

[31] Agenda 21, The United Nations Programme of Action. Chapter 18, para 18.8.

[32] Agenda 21, The United Nations Programme of Action. Chapter 18, para 18.47.

[33] World Water Council, 'About us' <http://www.worldwatercouncil.org/index.php?id=92> accessed 10 December 2012.

[34] World Water Council, 'Membership General Information' <http://www.worldwatercouncil.org/index.php?id=88> accessed 15 December 2012.

stakeholders in the water community[35], including public decision-makers and private companies from all over the world. The first World Water Forum was held on 22 March 1997 in Marrakech, Morocco. The Marrakech Declaration '*recommends action to recognize the basic human needs to have access to clean water and sanitation*'.[36] A similar statement was made in the Ministerial Declaration adopted at the Second World Water Forum, in The Hague in 2000. It was declared that one of the main challenges to achieve water security is '*to recognize that access to safe and sufficient water and sanitation are basic human needs and are essential to health and well-being*'.[37]

On 21 May 1997, the Convention on the Law of the Non-Navigational Uses of International Watercourses (UN Watercourse Convention)[38] was adopted by the General Assembly of the UN, as an annex to Resolution 51/229. This Convention concluded a process initiated in 1970, when the UN General Assembly asked the International Law Commission to study the law of the non-navigational uses of international watercourses with a view to its progressive development and codification. Some of the problems that triggered this study were the increasing water needs of the growing population, increasing water demand due to industrial growth, and emerging flood control efforts that required coordinated action between downstream and upstream states.[39] This Convention codifies the three most relevant principles of international water law: the principle of equitable and reasonable utilisation, the no significant harm rule and the obligation to cooperate. As to the first principle, in order to determine what an equitable and reasonable utilisation is, a number of relevant factors must to be considered, among them the social and economic needs of the watercourse states concerned and the population dependent on the watercourse in each watercourse state. The UN Watercourse Convention, in its article 10, provides that in the event of a conflict between uses of an international watercourse, it shall be resolved giving special regards to the requirement of vital human needs. Accordingly, it is understood that in determining these needs, special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation.[40] In other words, according to this principle the use of international watercourses to satisfy vital human needs, such as drinking, cooking,

[35] World Water Council, 'About us, Profile and mission' <http://www.worldwatercouncil.org/index.php?id=92> accessed 29 November 2012.
[36] World Water Council, Marrakech Declaration (adopted on 22 March 1997, at the First World Water Forum).
[37] World, Water Council, Ministerial Declaration of The Hague on Water Security in the 21st Century (adopted on 22 March 2000, at the Second World Water Forum) para 3. <http://www.worldwatercouncil.org/fileadmin/world_water_council/documents/world_water_forum_2/The_Hague_Declaration.pdf> accessed 20 July 2013.
[38] Convention of the Law of the Non-Navigational Uses of International Watercourses (UN Watercourse Convention) (adopted on 21 May 1997, not yet entered into force).
[39] Sir Arthur Watts KCMG, QC, *The International Law Commission 1949-1998* (Volume two: The Treaties, Part II, OUP, Oxford 1999) 1331-1332.
[40] Report of the Sixth Committee convening as the Working Group of the Whole, Convention on the Law of the Non-Navigational Uses of International Watercourse, 11 April 1997, UN Doc. A/51/869, para 8 <http://www.un.org/law/cod/watere.htm> accessed 20 August 2013.

personal and household hygiene and even the production of the necessary food to prevent starvation, should be given a priority use.

In 1999, the UN General Assembly adopted Resolution 54/175[41] regarding the right to development, in which the right to water is characterised as a fundamental human right. In paragraph 12 (a) of Resolution 54/175 the General Assembly reaffirms that, inter alia '*the rights to food and clean water are fundamental human rights and their promotion constitutes a moral imperative both for national Governments and for the international community*'.[42] This Resolution was adopted by 119 votes in favour[43], 10 against[44] and 38 abstentions[45]. According to the records of the plenary meeting there was no debate regarding the inclusion of the aforementioned phrase, since a recorded vote was not requested for the operative paragraph 12(a)[46], as it was asked for other paragraphs.

After that, at the United Nations Millennium Summit, held in September 2000 in New York, world leaders adopted the Millennium Declaration, from which the Millennium Development Goals (MDGs) emerged. [47] MDG Seven ensures environmental sustainability and, as its target, world leaders agreed to halve, by 2015, the proportion of the population without sustainable access to safe drinking water and basic sanitation.

Two years later, in September 2002, the World Summit on Sustainable Development took place in Johannesburg, South Africa. During the Johannesburg Summit, a Plan of Implementation on Sustainable Development was adopted. In the Plan it was agreed that '*the provision of clean drinking water and adequate sanitation is necessary to protect*

[41] This resolution was adopted by 119 votes in favour to 10 against, and 38 abstentions. See GAOR 83rd Plenary meeting, UN Doc. A/54/PV.83, 24.
[42] UNGA Resolution 54/175 (1999) Un Doc. A/Res/54/175, para 12(a).
[43] Afghanistan, Algeria, Angola, Antigua and Barbuda, Argentina, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belize, Benin, Bhutan, Bolivia, Botswana, Brazil, Brunei, Darussalam, Burkina Faso, Cambodia, Cameroon, Cape Verde, Chad, Chile, China, Colombia, Comoros, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Democratic People's Republic of Korea, Democratic Republic of the Congo, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Eritrea, Ethiopia, Fiji, Gabon, Ghana, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, India, Indonesia, Iran (Islamic Republic of), Jamaica, Jordan, Kazakhstan, Kenya, Kuwait, Lao People's Democratic Republic, Lebanon, Libyan Arab Jamahiriya, Malawi, Malaysia, Maldives, Mali, Mauritius, Mexico, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Nepal, Nicaragua, Nigeria, Oman, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Qatar, Russian Federation, Rwanda, Saint Lucia, Sierra Leone, Singapore, Solomon Islands, South Africa, Sir Lanka, Sudan, Suriname, Swaziland, Syrian Arab Republic, Tajikistan, Thailand, the former Yugoslav Republic of Macedonia, Togo, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United Republic of Tanzania, Uruguay, Venezuela, Viet Nam, Yemen, Zambia, and Zimbabwe.
[44] Canada, Denmark, Germany, Hungary, Iceland, Japan, Liechtenstein, the Netherlands, Sweden, and the United States of America.
[45] Albania, Andorra, Armenia, Australia, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Cyprus, Czech Republic, Estonia, Finland, France, Georgia, Greece, Ireland, Israel, Italy, Latvia, Lithuania, Luxemburg, Malta, Marshall Islands, Micronesia (Federated States of), Monaco, New Zealand, Norway, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, San Marino, Slovakia, Slovenia, Spain, United Kingdom of Great Britain and Northern Ireland, and Uzbekistan.
[46] General Assembly Official Records (GAOR), 54th Session (17 December 1999) UN Doc A/54/PV.83.
[47] United Nations. Millennium Development Goals. Background. Website <http://www.un.org/millenniumgoals/bkgd.shtml> 20 November 2012.

human health and the environment'.[48] In this respect, world leaders reaffirmed their commitment to halve, by the year 2015, the proportion of people who are unable to reach or to afford safe drinking water (as outlined in the Millennium Declaration) and the proportion of people who do not have access to basic sanitation.[49] The Millennium Development Goal that called for halving the proportion of the population without sustainable access to safe drinking water between 1990 and 2015 was already met in 2010, five years ahead of schedule. However it is unlikely that the target on sanitation will be met by 2015.[50]

At the end of 2002, the UN Committee on Economic, Social and Cultural Rights (CESCR), the treaty body of the International Covenant on Economic Social and Cultural Rights (ICESCR), adopted General Comment 15 on the right to water at its twenty-ninth session. Therein the CESCR asserts that the human right to water is implicitly embedded in article 11 of the ICESCR and entitles:

> *'everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements'.*[51]

In 2000, the Water Resource Committee of the ILA started to revise and update the Helsinki Rules to correspond with the current state of law, including customary international water law. In August 2004 a final report with a revised set of rules was discussed and approved during the ILA Seventy-first Conference, held in Berlin.[52] The revised rules are now known as the 2004 Berlin Rules, which replace the 1966 Helsinki Rules. The Water Resource Committee of the ILA explained that the Berlin Rules are '*integrating the traditional rules regarding transboundary water with rules derived from customary international environmental law and international human rights law that apply to all waters, national as well as international*'.[53] This means that the Berlin Rules combine different norms of international law that in a way are related to the uses and management of international watercourse, extending in this way the previous rules.

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[48] Plan of Implementation of the World Summit on Sustainable Development, p 11, para 8. http://www.unmillenniumproject.org/documents/131302_wssd_report_reissued.pdf accessed 20 December 2012.
[49] Plan of Implementation of the World Summit on Sustainable Development, para 8.
[50] --'Progress on Drinking-Water and Sanitation 2012 Update', (World Health Organization and UNICEF 2013) 2, 4 <http://www.unicef.org/media/files/JMPreport2012.pdf> accessed 20 July 2013.
[51] UN CESCR 'General Comment 15, the right to water' (2002) UN Doc. E/C.12/2002/11, para 2.
[52] Salman M.A. Salman, 'The Helsinki Rules, the UN Watercourse Convention and the Berlin Rules: Perspective on International Water Law' (2007) 23 (4) Water Resources Development 631, 635
[53] International Law Association, Water Resource Committee, 'Berlin Conference (2004) Water Resources law' (final Conference Report, Berlin 2004) 2 <http://www.ila-hq.org/en/committees/index.cfm/cid/32> accessed on 10 July 2013.

The principle of equitable and reasonable utilisation is still the basis of international water law and is found in article 12 of the Berlin Rules. The relevant factors to be considered to determine an equitable and reasonable use are listed in article 13. As in the Helsinki Rules, the factors include the social and economic needs of the basin states concerned, and the population dependent on the waters of the international drainage basin in each state.[54] The Berlin Rules are on the cutting edge to protect the human right to water, since clear elements of this right can be found in Chapter IV of these Rules, although the term 'human right' has not been explicitly incorporated anywhere in the Rules. Similar to the UN Watercourse Convention, the Berlin Rules give priority to the use of water to satisfy vital human needs among other uses.[55] One of the innovations of these Rules is that they define vital human needs as '*water used for immediate human survival, including drinking, cooking, and sanitary needs, as well as water needed for the immediate sustenance of a household*'.[56] In other words, the Berlin Rules give preference to the use of water for the satisfaction of the same needs that the human right to water is aiming at protecting. Moreover, the Berlin Rules incorporate some rights for individuals related to water resources, such as public participation and access to information (article 18) and the right of access to water (article 17). The latter right reproduces almost entirely the definition of the human right to water adopted by the CESCR in its General Comment 15. Article 17 of the Berlin Rules on the right of access to water states:

> *'Every individual has a right of access to sufficient, safe, acceptable, physically accessible, and affordable water to meet that individual's vital human needs'.*

On 13 March 2012, the sixth World Water Forum was held in Marseille, France. The ministers and heads of delegations reiterated through the ensuing Ministerial Declaration their commitment to '*fully achieve the Millennium Development Goals, and following the adoption of the United Nations Resolutions (A/RES/64/292, A/HRC/RES/15/9, A/HRC/RES/16/2 and A/HRC/RES/18/1) related to the recognition of the human right to safe and clean drinking water and sanitation'*. Furthermore, the ministers and heads of delegations *'commit to accelerate the full implementation of the human rights obligations relating to access to safe and clean drinking water and sanitation by all appropriate means as part of our efforts to overcome the water crisis at all levels*'.[57] However, this statement was criticised by some groups, including

[54] Berlin Rules, Article 13 (b)(c).
[55] Berlin Rules, Article 14 Preference among uses. "1. In determining an equitable and reasonable use, States shall first allocate waters to satisfy vital human needs.
2. No other use or category of uses shall have an inherent preference over any other use or category of uses".
[56] Berlin Rules, Article 3 (20).
[57] World Water Council, Ministerial Declaration 'Time for Solutions' (adopted 13 March 2012 at the sixth World Water Forum), para 3.

Amnesty International and Food and Water Watch, because the Ministerial Declaration failed to define water and sanitation as a human right and did not explicitly re-affirm its recognition of such a rights, which was considered a step backwards for water justice.[58] On the other hand, this Ministerial Declaration can be seen as an implicit recognition of the rights to water and sanitation and therefore a valuable instrument.

Following, the United Nations Conference on Sustainable Development (also known as RIO+20) was held in June 2012 in Rio de Janeiro, Brazil. The UN General Assembly adopted a Resolution entitled 'The Future We Want'. Therein the heads of state recognise that '*water is the core of sustainable development*', thus reiterating the importance of integrating water into sustainable development and underscoring the critical importance of water and sanitation within the three dimensions (social development, economic development and environmental protection) of sustainable development.[59] Moreover, through this Resolution the General Assembly reaffirms its '*commitment regarding the human right to safe drinking water and sanitation, to be progressively realised for our populations'*.[60]

Since the 1970's world leaders started to acknowledge the importance of access to safe drinking water for everyone. This recognition began when the direct link between the environment and human well-being became clear, particularly since available drinking water is becoming scarce. Different programmes, strategies, and goals have been proposed to deal with or to prevent a severe water crisis.

2.3. Definition and core content of the human right to water

The human right to water has been defined as a right to access water of *adequate quality* and in *sufficient quantity* to meet basic human needs.[61] McCaffrey talks about access to adequate amounts of safe, useable fresh water,[62] and McGraw about accessible, good

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<http://www.worldwaterforum6.org/fileadmin/user_upload/pdf/process_pol_elem/Ministerial_Declaration_Final_EN.pdf> accessed 25 November 2012.

[58] Claire Provost, 'World Water Forum Declaration Falls Short on Human Rights, Claim Expert' (London 14 March 2012) <http://www.guardian.co.uk/global-development/2012/mar/14/world-water-forum-declaration-human-rights> accessed 2 May 2013; Amnesty International, 'World Water Forum: States Must Live Up to Their Prior Commitments on the Human Rights to Water and Sanitation: Join Statement by Amnesty International and WASH-United' (Public statement) (27 February 2012) <http://www.amnesty.org/en/library/asset/IOR80/002/2012/en/91587d94-36fd-4156-a88e-30aa5763db72/ior800022012en.html> accessed 30 November 2012.

[59] UNGA Resolution 66/288 (27 July 2012) UN Doc A/RES/66/288, para 119.

[60] UNGA Resolution 66/288 (27 July 2012) UN Doc A/RES/66/288, para 121.

[61] John Scanlon, Angela Cassar and Noemi Nemes, *Water as a Human Right?* (IUCN Environmental Policy and Law Paper No 51, IUCN, Switzerland 2004) 28.

[62] Stephen C. McCaffrey, 'A Human Right to Water: Domestic and International Implications' (1992) 5 (1) The Georgetown International Environmental Law Review 7.

quality water in adequate supply.[63] However, the only definition with strong influence and legal weight in the field of human rights is the one adopted by the CESCR. On 26 November 2002, the CESCR, the authoritative interpreter of the ICESCR, adopted General Comment No 15 on the right to water.[64] Therein the CESCR affirmed that:

> *'[t]he human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirement*s' .[65]

The CESCR considers that the human right to water is implicitly included in article 11 of the ICESCR since this provision specifies a number of rights emanating from, and indispensable for, the realisation of the right to an adequate standard of living 'including adequate food, clothing an housing'. The CESCR deems that the use of the word 'including' indicates that this catalogue of rights is not intended to be exhaustive. The CESCR considers that the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.[66]

General Comment 15 defines and individualises for the first time the human right to water as a stand-alone right. General Comment 15 describes the normative content of this right, as well as state parties' obligations, and illustrates violations of the right to water. General Comment 15 starts by characterising water as a public good. This statement can be interpreted in two ways. On the one hand, it can be understood as a message to governments to ensure that the right to water is safeguarded if the management of water services is placed in private hands.[67] On the other hand, it can also be seen as a challenge to the view that water is a private good, a view expressed in the Dublin Statement. Both interpretations are valid. Firstly, although the CESCR does not request governments to adopt a particular economic model, it nevertheless commented on the realisation of the right to water when the service of drinking water is provided by private companies. For instance, governments must ensure that private providers are aware of and consider the importance of the right to water in pursuing their activities, and they must ensure that water is affordable when privately provided.

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[63] George S. McGraw 'Defining and Defending the Right to Water and its Minimum Core: Legal Construction and the Rile of National Jurisprudence' (Spring/Summer 2011) 127 Loyola University Chicago International Law Review 9.

[64] UN CESCR, 'Report of the Twenty-Eights and Twenty-Ninth Sessions 2002' UN Doc. E/C.12/2002/13, para 658.

[65] UN CESCR 'General Comment 15, the right to water' (2002) UN Doc. E/C.12/2002/11, para 2.

[66] UN CESCR 'General Comment 15, the right to water' (2002) UN Doc. E/C.12/2002/11, para 3

[67] Stephen C. McCaffrey, 'The Human Right to Water' in Edith Brown Weiss, Laurence Boisson de Chazournes and Nathalie Bernasconi-Osterwalder (eds), *Fresh Water and International Economic Law* (OUP, Oxford 2005) 104.

Secondly, the CESCR explicitly mentions that water should be treated as a social and cultural good, and not primarily as an economic good.[68]

Regarding the scope of application of the right to water, particularly *ratione personae*, the CESCR indicates that the human right to water applies to everyone, including the most vulnerable and marginalised. States are obliged to guarantee that the right to water is enjoyed without discrimination, on any of the prohibited grounds, and equally between men and women. It also asserts that states should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including, women, children, minority groups, indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners and detainees.[69] The CESCR explicitly asserts that the right to water should be guaranteed to individuals, as well as groups of people. Thus, the human right to water has a double character: it is an individual as well as a collective right. As a result, the protection of this right can be claimed by individuals and groups of people, for instance indigenous people.

2.3.1. Elements of the Right to Water

In order to identify the main elements that compose the human right to water, the normative content provided by CESCR in General Comment 15 will be taken as a basic parameter, due to the authoritative character of this documents in the field of human rights. The elements of the right to water must be adequate for human dignity, life and health. The manner of the realisation of this right must be sustainable, ensuring that the right can be realised for present and future generations.[70] According to the definition adopted in General Comment 15, we can identify the following as the main elements that compose the human right to water: (1) water is sufficient in quantity (availability); (2) water is safe and acceptable (quality and acceptability); (3) what is accessible (accessibility).

2.3.1.1. Availability

Availability means that the water supply for each person must be sufficient and continuous for personal and domestic uses.[71] Everyone has the right to '*sufficient*' water. This element is an adjective that denotes quantity. General Comment 15 does not explicitly mention what is considered a sufficient amount of water that must be guaranteed to realise this right. General Comment 15 mentions that there should be an adequate amount of safe water to prevent death from dehydration, to reduce risks of

[68] UN CESCR 'General Comment 15, the right to water' (2002) UN Doc. E/C.12/2002/11, para 11.
[69] UN CESCR, 'General Comment 15, the right to water' (2002) UN.Doc E/C.12/2002/11, paras 13, 16.
[70] UN CESCR 'General Comment 15, the right to water' (2002) UN Doc. E/C.12/2002/11, para 11.
[71] UN CESCR 'General Comment 15, the right to water' (2002) UN Doc. E/C.12/2002/11, para 12 (a)

water-related diseases and to provide for drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene.[72] General Comment 15 describes the basic human needs that should be ensured. Thus, the minimum amount of water that should be guaranteed through this right must allow any individual to meet those human needs. In other words, the amount of water necessary to guarantee this right must be adequate for human dignity, life, and health, in accordance with article 11, paragraph 1, and article 12 of the ICESCR.[73]

The CESCR in its General Comment 15 states that the quantity of water available for each person should correspond to the guidelines of the WHO. It also clarifies that some individuals and groups may require additional water due to health, climate and working conditions.[74] Studies have shown that certain groups of people, such as lactating women, persons in certain age groups, persons living in warm climates, and persons doing strenuous physical activities require different minimum amounts of water, at least for drinking purposes.[75] Therefore, it is very difficult to determine the exact amount of water that is required to fulfil the needs that the human right to water incorporates. This right only aims to guarantee water for the satisfaction of basic personal and domestic uses. Therefore, water for other domestic uses such as water for swimming pools or gardening, as well as other uses such as agriculture and industry are not guaranteed through this right.[76]

According to the Office of the United Nations High Commissioner for Human Rights (OHCHR) it is up to each country to determine which quantity represents the minimum reasonable amount of water needed to cover personal and domestic uses, which comprises water for drinking, washing clothes, food preparation and for personal and household hygiene.[77] The OHCHR also indicates that studies by the WHO can provide a useful guidance to determine the minimum reasonable amount of water necessary to satisfy these needs.

An early proponent of the right to water, P. Gleick, recommended that the minimum basic water requirement for human needs is 50 litres per capita per day, since every person needs an average of 5 litres for hydration, 10 litres for cooking, 15 litres for bathing, and 20 litres for hygiene and sanitation.[78] A threshold of 25 litres per person

[72] UN CESCR 'General Comment 15, the right to water' (2002) UN Doc. E/C.12/2002/11, paras 2, 12 (a).
[73] UN CESCR 'General Comment 15, the right to water' (2002) UN Doc. E/C.12/2002/11, para 11.
[74] UN CESCR 'General Comment 15, the right to water' (2002) UN Doc. E/C.12/2002/11 para 12 (a).
[75] Guy Howard and Jamie Bartram, 'Domestic Water Quantity, Service Level and Health', World Health Organization 2003, WHO/SDE/WSH/03.02, p 6.
[76] HRC, 'Report of the United National High Commissioner for Human Rights on the Scope and content of the Relevant Human Rights Obligations related to Equitable Access to Safe Drinking Water and Sanitation under International Human Rights Instruments', 16 August 2007, UN Doc A/HRC/6/3, para 13.
[77] HRC 'Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments', 16 August 2007, UN Doc. A/HRC/6/3, para 15.
[78] Peter H. Gleick, 'Basic Water Requirements for Human Activities: Meeting Basic needs' (1996) 21Water International 84-85.

per day represents the lowest level to maintain life, but this amount raises many health concerns, because it is insufficient to meet basic hygiene and consumption requirements.[79] A study of the WHO found out that water quantities used by households are primarily dependent on access as determined by distance or time for collection. The study also concluded that quantities between 50 and 100 litres of water per person per day seem to be sufficient to satisfy most basic hygienic and consumption needs, and few health concerns would arise. However, with quantities between 100 and 300 litres per person per day all uses can be met.[80]

In cases of emergency or extreme situations where there may not be sufficient water available to meet the basic needs, it is critical to provide at least survival quantities of safe drinking water. According to the report of the Sphere project, Humanitarian Charter and Minimum Standards in Humanitarian Response (the Sphere Standards)[81], basic provisions of water should be of at least 15 litres per person per day, provided in a maximum distance of 500 metres and with a queuing time at the source of no more than 30 minutes. The Sphere Standards also indicate that quantities of water needed for domestic use may vary according to climate, sanitation facilities, individual habits, cultural practices, types of food cooked, and clothes worn, among other things.[82]

With respect to persons deprived of their liberty, the International Committee of the Red Cross (ICRC) has indicated some minimum amounts of water. The ICRC asserts that regardless of climatic conditions, every detainee needs 3 to 5 litres of drinking water every day. This allocation does not include water for laundry, cleaning or general washing. The minimum amount of water needed for drinking, cooking and personal hygiene is 10 to 15 litres per person per day, and 1 litre per person per day for washing after using toilets. The ICRC indicates that these specifications must be read with caution, since other factors should be taken into account, such as the period during which the facility (water supply points, taps, sanitary facilities) is accessible to a given number of detainees, the climate and the adequacy of ventilation.[83]

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[79] HRC 'Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments',16 August 2007, UN Doc. A/HRC/6/3, para 15.

[80] Guy Howard and Jamie Bartram, 'Domestic Water Quantity, Service Level and Health', World Health Organization 2003, WHO/SDE/WSH/03.02, p 22.

[81] The Sphere Standard is an initiative of a group of humanitarian NGOs and the Red Cross and Red Crescent Movement to develop a set of universal minimum standards in core areas of humanitarian response.

[82] The Sphere Project, *The Sphere Handbook, Humanitarian Charter and Minimum Standards in Humanitarian Response*, (3rd edn, The Sphere Project, 2001) 97.

[83] International Committee of the Red Cross, 'Water, Sanitation, Hygiene and Habitat in Prisons (International Committee of the Red Cross 2012) 38, 45 <http://www.icrc.org/eng/assets/files/publications/icrc-002-4083.pdf> accessed 24 September 2013.

2.3.1.2. Quality and acceptability

Water must be '*safe*', which refers to the quality of the water. It is essential to bear in mind that water in general, has a social, economic and environmental value and should be managed so as to realise the most acceptable and sustainable combination of those values. Therefore, it is not possible to expect the same level of water quality for water that is used for industrial or economic purposes, and for water that is used for social purposes, such as drinking water. As a result, the quality of the water will depend on its use. Regarding drinking water, a high level of water quality, or access to technology to produce drinking water of high quality, is expected.

The emphasis on water quality came to light only after the sources and effects of drinking water contaminants came within human understanding in the latter half of the nineteenth century.[84] It is estimated that about 70 to 80 percent of illnesses are water and sanitation related.[85] Water must be free from chemical, biological and other hazards that may affect the life and health of people. Water that is not safe for human consumption can produce a number of different diseases. Each year millions of people, particularly children, die from water-related diseases, including cholera, typhoid, infective hepatitis, guinea worm and schistosomiasis.[86] Clean water is absolutely essential for human existence and plays an important role in the overall health of human beings. Safe water means that water is not risky for human health. Accordingly, water should not represent any significant risk to health over a lifetime of consumption; it must be safe and therefore free of microbial pathogens, chemical and radiological substances.[87]

To ensure the safety of water, disinfection may be necessary to kill microbial pathogens. Regarding chemical and radiological substances there is not yet an international code or convention that establishes maximum and minimum levels to determine what is understood as safe drinking water. Despite the fact that safe water is essential for human health, there are no universal water quality standards. However, the WHO has developed some guidelines concerning drinking-water quality for the protection of public health.[88] It is explicitly mentioned in the WHO Guidelines that the main reason

[84] Sujith Koonan and Adil Hasan Khan, "Water, Health and Water Quality Regulations" in Philippe Cullet and others (eds) *Water Law for the Twenty-First Century, National and International Aspect of Water Reform in India* (Routledge, London 2010) 289.

[85] Sujith Koonan and Adil Hasan Khan, "Water, Health and Water Quality Regulations" in Philippe Cullet and others (eds) *Water Law for the Twenty-First Century, National and International Aspect of Water Reform in India* (Routledge, London 2010) 287.

[86] Hendrik J. Bruins, 'Proactive Contingency planning vis-a-vis Declining Water Security in the 21st Century' (2000) 8 (2) Journal of Contingencies and Crisis Management 64

[87] World Health Organization, *Guidelines for Drinking-water Quality* (4th edn WHO, Gutenberg 2011) 1.

[88] World Health Organization *Guidelines for Drinking-Water Quality: incorporating 1st and 2nd addenda to third edition* (3rd edn Vol. 1 Recommendations, WHO, Geneva 2008) Chemical fact sheets and Annex 4 Chemical Summary Tables. At the regional level, the European Union adopted the Council Directive 98/83/EC on November 3 of 1998, on the quality of water intended for human consumption, this means for all water either in its original state or after treatment, intended for drinking, cooking, food preparation. This Directive establishes some chemical and biological parameters that Member States shall comply

for not promoting the adoption of international standards for drinking-water quality is the advantage provided by the use of a risk-benefit approach (qualitative or quantitative) in the establishment of national standards and regulations.[89] Additionally, there is no single approach that is universally applicable, since regulation (national, regional, or international) largely depends upon factors such as needs, regulatory potential and the capacity of individual countries.[90] For instance, when establishing standards and regulations, care should be taken to ensure that scarce resources are not unnecessarily diverted to the development of standards and monitoring of substances of relatively minor importance to public health.[91]

Since there are no universal standards applicable to all states, drinking water standards vary among countries and regions. At the regional level, the European Union adopted on 3 November 1998, Drinking Water Directive 98/83/EC[92] on the quality of water intended for human consumption. The focus of the Directive is on all water, either in its original state or after treatment, intended for drinking, cooking and food preparation. This Directive requires Member States to set values applicable to drinking water for the biological and chemical parameters set out in Annex I of the Directive. The values set cannot be less stringent than those set out in the Annex I. Although at the regional level of the European Union there is a Directive establishing drinking water quality standards, the latter can vary among states if they decide to set more stringent values. The set values established in the Directive are only used as a baseline. In general, around the world each state establishes its own drinking water quality standards, most of the time taking into account the WHO guidelines.

The WHO guidelines intend to support the development and implementation of risk management strategies that will ensure the safety of drinking water supplies through the control of hazardous constituents in water.[93] These guidelines also offer a list of

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with to ensure that water intended for human consumption is wholesome and clean (art 4 of this Directive). The parametric values shall be complied with: a) in the case of water supplied from a distribution network, at the point, within the premises or an establishment, at which it emerges from the taps that are normally used for human consumption; b) in the case of water supplied from a tanker, at the point at which it emerges from the tanker; c) in the case of water put into bottles or containers intended for sale, at the point at which the water is put into the bottles or containers; and d) in the case of water used in a food-production undertaking, at the point where the water is used in the undertaking. Council Directive (EC) 98/83 on the quality of water intended for human consumption [1998] OJ L330 / art 6.

[89] World Health Organization, *Guidelines for Drinking-water Quality* (4th edn WHO, Gutenberg 2011) 1.

[90] Sujith Koonan and Adil Hasan Khan. "Water, Health and Water Quality Regulations" in Philippe Cullet and others (eds) *Water Law for the Twenty-First Century, National and International Aspect of Water Reform in India* (Routledge, London 2010) 290

[91] World Health Organization, *Guidelines for Drinking-water Quality* (4th edn WHO, Gutenberg 2011) 2.

[92] Council Directive (EC) 98/83 on the quality of water intended for human consumption [1998] OJ L330 / art 5.

[93] It should be borne in mind that the WHO is not promoting the adoption of international standards for drinking quality because of the advantage provided by the use of a risk-benefit approach. See WHO *Guidelines for Drinking-Water Quality: incorporating 1st and 2nd addenda to third edition* (3rd edn Vol. 1 Recommendations, WHO, Geneva 2008) 1.

chemicals that are of health significance in drinking water, and it suggests a guideline value for its quantity in water for drinking purposes.[94]

In order to keep water free from harmful elements it is important to protect water bodies used as sources of drinking water. Also there must be an effective protection to related water ecosystems, from pollution from causes, including agriculture, industry and other discharges and emissions of hazardous substances.[95]

Water should be '*acceptable*' in colour, odour and taste.[96] Some substances at higher concentrations than would normally be desirable may not result in an undue risk to health. However, they may give rise to problems as to taste or odour; making drinking water so unpalatable that people would not drink it.[97] This situation may cause individuals to look for alternative sources of water, which may present a greater health risk.

2.3.1.3. Accessibility

Water must be '*accessible*'. Water and water facilities and services must be accessible to all, including the most vulnerable or marginalised groups of the population. There must be no discrimination, either in law or in fact, on any of the prohibited grounds (race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status, sexual orientation and civil, political, social or other status).[98] There should be equal and non-discriminatory access to water. No group within the population should be excluded and priorities in allocating limited public resources should be given to those who do not have access or face discrimination in accessing safe drinking water.[99]

Accessibility is subdivided into three other elements: physical, economic and information accessibility.

[94] World Health Organization, *Guidelines for Drinking-Water Quality: incorporating 1st and 2nd addenda to third edition* (3rd edn Vol. 1 Recommendations, WHO, Geneva 2008) Chemical fact sheets and Annex 4 Chemical Summary Tables.
[95] Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Article 4. 2(a) and (c).
[96] UN CESCR 'General Comment 15, the right to water' (2002) UN Doc. E/C.12/2002/11, para 12(b).
[97] World Health Organization, *Guidelines for Drinking-water Quality* (4th edn WHO, 2011) 199.
[98] UN CESCR 'General Comment 15, the right to water' (2002) UN Doc. E/C.12/2002/11, para 12(c)(iii).
[99] HRC 'Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments'(2007) UN. Doc. A/HRC/6/3.

2.3.1.3.1. Information accessibility

Information accessibility refers to the right to seek, receive and impart information concerning water issues.[100] Individuals should have access to information to be able to participate in decision-making that involves access to drinking water.

2.3.1.3.2. Physical accessibility

Physical accessibility means that water, water facilities and water services must be accessible within the immediate vicinity of each household, educational institution and workplace, and must be within safe reach for all groups of populations, taking into account the needs of particular groups, including children, persons with disabilities, women and the elderly. All water facilities and services must be of sufficient quality, culturally appropriate and sensitive to gender, lifecycle and privacy requirements.[101] The WHO said that the ultimate goal is to provide in-home service for all citizens. But due to the restrictive expenses of installing indoor plumbing, accessibility becomes the minimum goal.[102]

A WHO report shows that water sources should be normally within less than 1,000 meters of the household and collection time should not exceed a 30 minute round trip, which will allow collecting a maximum of 20 litres of water a day. [103] However, this amount of water still creates health concerns because not all requirements may be met. For instance, laundry and/or bathing may occur at water sources, which mean that additional volumes of water are used.[104] This means that 20 litres of water per person per day is not enough to satisfy all the basic needs, such as personal hygiene and household cleaning, and it is difficult to access more water if the point of source is located at certain distances. The UN High Commissioner for Human Rights recommends that states take steps to ensure that water of good quality can be collected within a reasonable distance from a person's home.[105] In addition, personal security of individuals should not be threatened while accessing water and sanitation. There should

[100] UN CESCR 'General Comment 15, the right to water' (2002) UN Doc. E/C.12/2002/11, para 12(c)(iv).
[101] HRC 'Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments'(2007) UN Doc. A/HRC/6/3, para 25.
[102] Amy Hardberger, 'Liberty, and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations it creates' (2005) 4 (2) Northwestern University Journal of International Human Rights.
[103] HRC 'Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments' (2007). UN Doc. A/HRC/6/3, para 26.
[104] Guy Howard and Jamie Bartram, 'Domestic Water Quantity, Service Level and Health', World Health Organization 2003, table 6, p 22.
[105] HRC 'Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments' (2007). UN Doc. A/HRC/6/3, para 66.

be respect for privacy, human dignity and the integrity of the person, as well as protection from violence against women and girls.[106]

Securing access to water in rural areas might also require protecting access by domestic users to traditional water sources and protecting these sources from unsustainable extraction by industry or agriculture.[107]

2.3.1.3.3. Affordability

Another element to be examined is '*affordability*' or economic access. It requires that direct and indirect costs (connection and delivery costs) related to water and sanitation should not prevent a person from accessing safe drinking water.[108] The human right to water does not mean *per se* that water should be provided for free to everyone. It means that nobody should be deprived of access to at least the minimum amount of water to satisfy vital human needs because of the inability to pay. Affordability implies that cost recovery (pricing) should not become a barrier to access safe drinking water and sanitation, particularly for the poor.[109] However, only in some circumstances drinking water should be subsidised or provided for free.

The question of accessibility does not only refer to physical distance or proximity. While water might be provided directly at home, some people might not have effective access to it because they cannot afford to pay for the services of water, due to their precarious economic situation.[110] A clear example of this is that two in three people lacking access to clean water survive on less than US$2 a day. Also poor people living in slums often pay 5 to 10 times more per litre of water than wealthy people living in the same city.[111] Good pricing policies are necessary to guarantee access to water, particularly to the poor.

States have the obligation to ensure that drinking water is affordable to all. This means that in certain circumstances they are required to provide water for free, for instance in emergency situations, or when individuals have no income and no alternatives for

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[106] HRC 'Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments' (2007) UN Doc. A/HRC/6/3, para 25.
[107] HRC 'Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments', 16 August 2007, UN Doc. A/HRC/6/3, para 25.
[108] UN CESCR 'General Comment 15, the right to water' (2002) UN Doc. E/C.12/2002/11, para 12.
[109] HRC 'Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments', 16 August 2007, UN Doc. A/HRC/6/3, para 28.
[110] Edith Brown Weiss, 'The Right to Water' in Edith Brown Weiss (Ed), *The Evolution of International Water Law* (Collected Courses of the Hague Academy of International Law, Vol. 331 Martinus Nijhoff Publishers, 2009) 314.
[111] United Nation Development Programme. *Human Development Report 2006* (United Nations Development Programme, New York 2006) 16 and 21 http://hdr.undp.org/en/reports/global/hdr2006/ accessed 8 May 2012.

accessing this service.[112] In order to make water affordable, particularly for the poor, states have adopted different mechanisms. Some of these mechanisms include: 1) free basic water, which ensures access to a minimum amount of water for personal and household use for free or for a minimal charge; 2) direct subsidies for poor families; 3) cross-subsidies, providing lower tariffs to particular groups, funded through an increased tariff to other groups with better economic capacity; and 4) increasing block tariffs, charging less for small amounts of water consumption and increasingly more for greater consumption.[113] It is important that whatever mechanism a state uses to make water affordable, it will reach those in real need rather than the middle or even high income population.

Although disconnection of drinking water is not prohibited, states are required to respect the commonly agreed principles of due process, take into account a person's capacity to pay and not deprive an individual who is unable to pay the minimum essential level of water. Accordingly, the quantity of safe drinking water a person can access may be reduced, but full disconnection may only be permissible if there is access to an alternative source which can provide a minimum amount of safe drinking water needed to prevent diseases.[114]

Overall, General Comment 15 has been criticised because it provides little indication of how clean, reliable, or minimum water supply is measured.[115] General Comment 15 was adopted as a guiding document to inform states about the most important elements that need to be taken into account when implementing the right to water. States need to complement some of those elements. To do so, General Comment 15 recommends states follow international studies, such as those of the WHO,[116] regarding the main elements of this right. General Comment 15 is perhaps a first step to define the meaning and content of the right to water, which is still evolving. But it is then the task of states to flesh out the content of this right according to their own conditions. For this purpose, scientific knowledge, particularly regarding the water available at the national level, water quality and studies on the minimum amount of water that a person needs to fulfil

[112] Catarina de Albuquerque, *On the Right Track, Good Practices in Realising the Rights to Water and Sanitation* (Human Right to Water and Sanitation UN Special Rapporteur Lisbon 2012) 91 <http://www.ohchr.org/Documents/Issues/Water/BookonGoodPractices_en.pdf> accessed 12 July 2013.
[113] Catarina de Albuquerque, *On the Right Track, Good Practices in Realising the Rights to Water and Sanitation* (Human Right to Water and Sanitation UN Special Rapporteur Lisbon 2012) 83 <http://www.ohchr.org/Documents/Issues/Water/BookonGoodPractices_en.pdf> accessed 12 July 2013.
[114] HRC 'Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments', 16 August 2007, UN Doc. A/HRC/6/3, para 59.
[115] Stephen Tully, 'A Human Right to Access Water? A Critique of General Comment No. 15' (2005) 23(1) Netherlands quarterly of Human Rights 38.
[116] Regarding the minimum amounts of water that states should guarantee to implement the human right to water, as well as physical accessibility see Guy Howard and Jamie Bartram, 'Domestic Water Quantity, Service Level and Health', World Health Organization 2003, WHO/SDE/WSH/03.02. Concerning water quality standards see World Health Organization, *Guidelines for Drinking-water Quality* (4th edn WHO, Gutenberg 2011).

all his or her vital human needs, as well as economic and financial information to make water affordable to all, should be taken in to account.

2.4. State's obligations concerning the human right to water

The obligations of states concerning human rights will depend on the type of right that is protected, i.e. a civil and political right or an economic, social and cultural right.

If the right to water is an economic, social and cultural right, as it is proposed in General Comment 15 under the ICESCR, then an immediate and progressive obligation to realise the right rests on states parties. As part of their immediate obligations, states must guarantee that the right to water will be exercised without discrimination of any kind. As part of the progressive obligations states will need to take steps towards the full realisation of article 11, paragraph 1, and article 12. Such steps must be deliberate, concrete and targeted towards the full realisation of the right to water.[117] The obligation not to take retrogressive measures is also included here.

In this section the different types of obligations that any state must undertake for the realisation of economic, social and cultural rights will be discussed. The tripartite general obligation of human rights, their compliance, as well as what the CESCR describes as core obligations, which correspond to the minimum level of satisfaction of human rights, will be analysed.

2.4.1. Typology of human rights obligations at national level

Rights require correlative duties, but they are not spelled out in great detail in the main human rights conventions. They have been clarified through additional instruments and through the monitoring and recommendations of UN treaty bodies. Under international law, obligations for human rights are primarily held by states.[118] It is generally accepted that state's obligations concerning human rights can be examined at three levels, which nowadays are known as the obligations to respect, to protect and to fulfil.[119]

A tripartite typology of duties was first developed by Henry Shue, who indicated that with every basic right three types of duties correlate: 1) the duties to *avoid* deprivation, meaning not to take action that deprive others of a means that would have satisfied their

[117] UN CESCR, 'General Comment 15 the right to water' (2002) UN.Doc E/C.12/2002/11, para 17.
[118] Asbjørn Eide, 'Economic, Social and Cultural Rights as Human Rights', in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A textbook* (2 revised edn, Martinus Nijhoff Publishers, Dordrecht 2001) 22.
[119] Henry Shue, 'The Interdependence of Duties', in Philip Alston and Katarina Tomaševski (eds) *The Right to Food* (Martinus Nijhoff Publishers, Stichting Studie-en Informatiecentrum Mensenrechten-SIM, The Hague 1984) 84.

right (to refrain from); 2) the duties to *protect* from deprivation, consisting in the protection of people against the deprivation caused by other people; and 3) the duties to *aid* the deprived, meaning to help those who are unable to satisfy their rights on their own.[120]

Then, other authors such as Asbjørn Eide, Philip Alston and van Hoof worked on the development of this typology of obligations.[121] Van Hoof asserted that a way to approach the problem of implementation regarding human rights was from the angle of obligations, which could be named the obligation to respect, to protect, to ensure and to promote. Van Hoof defined these obligations in the following manner. The obligation to respect refers to non-interference from the state. The obligation to protect goes further, since it forces the state to take steps – through legislation or other mechanisms – to prevent or prohibit others (third persons) from violating recognised rights or freedoms. The obligation to ensure requires that the state actively creates conditions conducive to a more effective realisation of the rights or freedoms. The obligation to promote is designed to achieve a certain result, and is formulated in goals. The obligations to ensure and promote are connected and together encompass programmatic obligations in the economic, social and cultural rights.[122]

Additionally, the typology of obligations that derive from human rights, particularly economic and social rights, has been further developed by Asbjørn Eide, while he was Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. These obligations have been consolidated in the obligation to respect, protect and fulfil, as endorsed by the CESCR for the first time in its General Comment 12.[123] This tripartite typology has continued to evolve and it is now well established and regularly used by the CESCR as well as in literature.

2.4.1.1. Obligation to respect

According to Eide, obligations of states must depart from the assumption that human beings seek to find their own solutions to their needs. States should respect the resources owned by the individual, to make optimal use of her or his knowledge and the freedom to take the necessary actions and use the necessary resources to satisfy his or

[120] Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (2 edn, Princeton University Press, Princeton 1996) 52-56.
[121] Henry Shue, 'The Interdependence of Duties', in Philip Alston and Katarina Tomaševski (eds) *The Right to Food* (Martinus Nijhoff Publishers, Stichting Studie-en Informatiecentrum Mensenrechten-SIM, The Hague 1984) 84-85.
[122] G.J.H van Hoof, 'The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views', in Philip Alston and Katarina Tomaševski (eds) *The Right to Food* (Martinus Nijhoff Publishers, Stichting Studie-en Informatiecentrum Mensenrechten-SIM, The Hague 1984) 106.
[123] UN CESCR, 'General Comment 12 Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights' (1999) UN Doc. E/C.12/1999/5.

her needs.[124] This obligation requires a state, and all its organs and agents, to abstain from doing anything that violates the integrity of the individual or infringes on her/his freedom, including the freedom to use the material resources available to that individual in the way she/he finds best to satisfy basic needs.[125] The state must, respect the resource owned by the individual, her or his freedom to find a job of preference and the freedom to take the necessary actions and use the necessary resources - alone or in association with others - to satisfy his or her own needs.[126]

The obligation to respect is a negative duty of the state, which means the obligation not to interfere with rights and freedoms of individuals, in other words, not to destroy them by state action.[127] This obligation refers to the responsibility of the state not to violate human rights, therefore, abstaining from actions that may put the rights of others at risk. The obligation to respect requires states to refrain from interfering directly or indirectly with the enjoyment of the right. Public bodies should refrain from carrying out or tolerating any policy that involves human rights violations.[128]

General Comment 15 clearly describes what is expected from states regarding this type of obligation. Concerning the human right to water, it says that the obligation to respect includes, '*refraining from engaging in any practice or activity that denies or limits equal access to adequate water; arbitrarily interfering with customary or traditional arrangements for water allocation; unlawfully diminishing or polluting water, for instance through waste from state-owned facilities or through the use and testing of weapons; and by limiting access to, or destroying, water services and infrastructure as a punitive measure, for example during armed conflicts in violation of international humanitarian law*'.[129]

The problem of disconnecting individuals from drinking water services is considered under the obligation to respect. Households are often arbitrarily disconnected, particularly when there is an inability to pay for water. Langford states that disconnections should only proceed if there is an alternative adequate and appropriate water source and under certain conditions[130] mentioned in the General Comment 15: 1) opportunity for genuine consultation with those affected; 2) timely and full disclosure of

[124] Commission on Human Rights, 'The Right to Adequate Food and to be Free from Hunger, Updated study on the right to food, submitted by Mr. Asbjørn Eide in Accordance with Sub-Commission Decision 1998/106', 28 June 1999, UN Doc. E/CN.4/Sub.2/1999/12, para 52(a)
[125] Asbjørn Eide, 'Realization of Social and Economic Rights and the Minimum Threshold Approach' (1989) 10 (1-2) Human Rights Law Journal 37.
[126] Asbjørn Eide, 'Economic, Social and Cultural Rights as Human Rights', in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A textbook* (2 revised edn, Martinus Nijhoff Publishers, Dordrecht 2001) 23.
[127] Michał Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp 2009) 60.
[128] Aniza Garcia, *El Derecho Humano al Agua* (Editorial Trotta, Madrid 2008) 205.
[129] UN CESCR, 'General Comment 15, the right to water' (2002) UN Doc. E/C.12/2002/11, para 21.
[130] Malcolm Langford, 'The United Nations Concept of Water as a Human Right: A New Paradigm for Old Problems?' (2005) 21 (2) Water Resources Development 277-278.

information on the proposed measures; 3) reasonable notice of proposed actions; 4) legal recourse and remedies for those affected; and 5) legal assistance for obtaining legal remedies. In addition, the capacity to pay must also be taken into account. Under no circumstances, not even for failure to pay for water, should an individual be deprived of the minimum essential level of water.[131]

2.4.1.2. Obligation to protect

The obligation to protect is an obligation requiring the state and its agents to take the necessary measures to prevent other individuals or groups from violating the integrity, freedom of action, or other human rights of the individual.[132] This obligation requires states to prevent third parties from interfering in any way with the enjoyment of the right. Third parties include individuals, groups, corporations and other entities, as well as agents acting under their authority (also known as non-state actors). With respect to the right to water, the obligation includes adopting necessary and effective legislative and other measures, for example, to restrain third parties from denying equal access to adequate water; to avoid pollution of water resources; and to avoid inequitably extracting water from water resources, including natural sources, wells and water distribution systems.[133] The obligation to protect entails that states protect individuals against harmful activities carried out by non-state actors and prevent violations by such actors by creating and implementing the necessary policy, legislative, regulatory and judicial inspection and enforcement framework. When a violation occurs the state is obliged to take appropriate measures to punish and investigate the harm caused by non-state actors, and when necessary to provide an effective remedy.[134]

General Comment 15 has been criticised for not placing any duties on the private sector. Corporations are merely called upon to maintain the operational status quo.[135] It should be borne in mind that states are the first responsible at the national and international level for the implementation and respect of human rights. Human rights are enforceable primarily towards states.[136] Irrespective of the responsibility of non-state actors in service provision, the state remains the primary duty-bearer for the realisation of human rights.[137] Therefore, states must reasonably prevent any situation that adversely affects

[131] UN CESCR, 'General Comment 15, the right to water' (2002) UN Doc. E/C.12/2002/11, para 56.
[132] Asbjørn Eide, 'Realization of Social and Economic Rights and the Minimum Threshold Approach' (1989) 10 (1-2) Human Rights Law Journal 37.
[133] UN CESCR, 'General Comment 15, the right to water' (2002) UN Doc. E/C.12/2002/11, para 23.
[134] Manisuli Ssenyojo, *Economic, Social and Cultural Rights in International Law* (Hart Publishing, Oxford 2009) 24.
[135] Stephen Tully, 'A Human Right to Access Water? A Critique of General Comment No. 15' (2005) 23 (1) Netherlands Quarterly of Human Rights 54.
[136] Aniza Garcia, *El Derecho Humano al Agua* (Editorial Trotta, Madrid 2008) 194.
[137] HRC, 'Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque', (29 June 2010) UN Doc. A/HRC/15/31, Para 18

human rights by regulating and imposing limits on the actions of persons (natural or legal) within their jurisdiction. I believe that the CESCR took a conservative approach on this issue since the nature and scope of the responsibilities of business enterprises under international human rights obligations were under discussion.[138]

It is essential that if drinking water supply services are totally or partially under the control of private companies – national or transnational - there are appropriate mechanisms to hold them accountable in the event of a violation of the right to water. States must take the appropriate measures to prevent that those companies obtain economic benefits, or any other advantages, by interfering with the right of individuals to water.[139]

According to the Draft Articles on State Responsibility adopted by the International Law Commission,[140] the state is also responsible for the actions of private persons or entities if they are empowered to perform public functions. Article 5 of the Draft Articles provides that *'the conduct of a person or entity which is not an organ of the States under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance*'. [141] The generic term 'entity' may include public corporations, semi-public entities, and even private companies, provided that in each case the entity is empowered by the law of the state to exercise functions of a public character normally exercised by state agencies, and the conduct of the entity relates to the exercise of the governmental authority concerned.[142] In addition, whether a contract (e.g. a concession contract for the provision of water) entails empowerment to exercise 'governmental authority' depends on what is considered governmental in a particular society, taking into account its history and traditions.[143] Normally the provision of water is seen as a

[138] See HRC, 'Report of the United National High Commissioner for Human Rights on the Scope and content of the Relevant Human Rights Obligations related to Equitable Access to Safe Drinking Water and Sanitation under International Human Rights Instruments', 16 August 2007, UN Doc A/HRC/6/3, para 31;Working Group on the issue of human rights and transnational corporations and other business enterprises, 'Guiding Principles on Business and Human Rights: Implementing the Uninted Nations "Protect, Respect and Remedy" Framework', (UN Human Rights Office of the High Commissioner, New York 2001), HR/PUB/11/04

[139] Aniza Garcia, *El Derecho Humano al Agua* (Editorial Trotta, Madrid 2008) 207.

[140] The International Law Commission, Draft Article on State Responsibility for Wrongful Acts (adopted by the International Law Commission at its fifty-third session, in 2001), Yearbook of the International Law Commission, 2001, Vol. II, Part Two.

[141] The International Law Commission Draft Article on State Responsibility for Wrongful Acts, Article 5.

[142] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries 2001, 44 <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> accessed 16 September 2013.

[143] Susan Marks and Fiorentina Azizi, 'Responsibility for violations of Human Rights Obligations: International Mechanisms', in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford Commentaries on International Law, OUP, Oxford 2010) 727.

public function. If a state delegates this function to a private company, the former can still be held accountable in case there is a violation of the right to water in the development of such function. Therefore, where private companies violate human rights in the process of exercising such authority, the state can be held accountable for the violation since the state cannot absolve itself of responsibility by delegating its obligations to private bodies or individuals.[144] Therefore, it is a state's responsibility to properly regulate the activities of companies that are directly linked with the enjoyment of fundamental rights. According to McMurry, states are therefore, in theory, equally accountable under international human rights law within a private or a public system of water providers.[145] To prevent abuses from operators of water services an effective regulatory system must be established, which includes independent monitoring, control of prices, genuine public participation and the imposition of penalties for non-compliance.[146]

However, the overwhelming power, particularly economic power, exerted by a small group of states, international financial institutions and transnational corporations, sometimes forces weaker states to accept private investment in their natural resources. Consequently, these states lose control over policies that are central to fulfilling their human rights obligations.[147] Needing loans and foreign investment to strengthen their economies and satisfy the needs of their growing populations, developing states are often powerless to demand that investing companies respect and adhere to human rights obligations. This circumstance has created increasing support for the application of human rights law to non-state actors, such as, corporations and international financial institutions. The UN has also considered and studied this problem, welcoming in 2008 the 'Protect, Respect and Remedy Framework' developed by John Ruggie as Special Representative of the Secretary General.[148] Because states are the primarily responsible for protecting and implementing human rights, this book focuses on the obligations of state actors; it is beyond the scope of this book to analyse the human rights obligations of non-state actors.

International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries 2001, 43.

[144] Walter Kalin and Jorg Kunzli, *The Law of International Human Rights Protection* (OUP, Oxford 2009) 78-79.

[145] Nicholas McMurry, 'Water privatization: Diminished Accountability' (2011) 2 Human Rights and International Discourse 249.

[146] UN CESCR, 'General Comment 15, the right to water' (2002) UN Doc. E/C.12/2002/11, para 24.

[147] Smita Narula, 'International Financial Institutions, Transnational Corporations and Duties of States' in Malcom Langford and others (eds) *Global Justice, State Duties, The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (UCP, Cambridge 2013) 114-115.

[148] Human Rights Council, 'Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie. Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy "Framework, 21 March 2011, UN Doc. A/HRC/17/31.

As part of the obligation to protect, the duty of the state includes monitoring, taking pre-emptive regulatory and policy measures, investigating, prosecuting and providing a remedy for infringements.[149]

Regarding the question whether management of water services should be public or private, General Comment 15 has taken a neutral position. The Committee has interpreted the Covenant to mean that states have flexibility in choosing their economic system. [150] In this case, the CESCR decided to leave the question open. Each government can choose among public management, privatisation and public-private partnerships. The CESCR did not mention whether private sector involvement was ultimately good or bad.[151] However, the CESCR clearly says that the involvement of the private sector in the provision of water must be consistent with democratic principles, particularly the right to participation.[152]

2.4.1.3. Obligation to fulfil

The state has the obligation to facilitate opportunities by which the rights can be enjoyed. It has the obligation to fulfil the rights of those who otherwise cannot enjoy their economic, social and cultural rights.[153] The obligation to fulfil requires the state to take the measures necessary to ensure for each individual within its jurisdiction opportunities to obtain satisfaction of the needs, recognised in the human rights instruments, which cannot be secured by personal efforts.[154] This type of obligation may take two forms: one consists of assistance to provide opportunities for those who have not (obligation to fulfil-facilitate); the other consists of the direct provision of resources that can be used for the satisfaction of basic needs (obligation to fulfil-provide).[155] The obligation to fulfil by providing could consist in making available what is required to satisfy basic needs (direct food aid or social security) when no other possibility exists, such as for example: 1) when unemployment sets in, in case a recession; 2) for the

[149] Nicholas McMurry, 'Water privatization: Diminished Accountability' (2011) 2 Human Rights and International Discourse 249.
[150] Malcolm Langford, 'The United Nation Concept of Water as a Human Rights: A New Paradigm for Old Problems?' (2005) 21 (2) Water Resources Development 278.
[151] Eibe Riedel, 'The Human Right to Water and General Comment No 15 of the Committee on Economic, Social and Cultural Rights', in Eibe Riedel and Peter Rothen (eds) *The Human Right to water* (BWV-Berliner Wissenschafts Verlag GmbH, Berlin 2006) 29.
[152] Malcolm Langford, 'The United Nation Concept of Water as a Human Rights: A New Paradigm for Old Problems?' (2005) 21 (2) Water Resources Development 278.
[153] Commission on Human Rights, 'The Right to Adequate Food and to be Free from Hunger, Updated study on the right to food, submitted by Mr. Asbjørn Eide in Accordance with Sub-Commission Decision 1998/106', 28 June 1999, UN Doc. E/CN.4/Sub.2/1999/12, para 52 (c)(d).
[154] Asbjørn Eide, 'Realization of Social and Economic Rights and the Minimum Threshold Approach' (1989) 10 (1-2) Human Rights Law Journal 37.
[155] Asbjørn Eide, 'Article 25' in Asbjørn Eide and others (eds) *The Universal Declaration of Human Rights, a Commentary* (Scandinavian University Press, Norway 1992) 388.

disadvantage, and the elderly; 3) during situations of crisis or disaster; and 4) for those who are marginalised.[156]

The obligation to fulfil consists on the positive obligation of facilitating access to the right to water. Like any other economic and social rights, the right to water is not expected to be realised overnight, but states must immediately take positive measures towards ensuring this right. Positive measures include recognising the right to water within national policy and legal systems, preferably through legislative implementation; adopting a national strategy and plan of action to realise this right; ensuring that water is affordable for everyone; and facilitating improved and sustainable access to water, particularly in rural and deprived urban areas.[157] This obligation means that states must actively search for available resources, internationally, nationally and locally; implement a plan and monitor its implementation; and provide systems of accountability so citizens can bring information or complaints about failures of the system.[158] An essential element of the state's obligation to fulfil the right to water is to extend and improve connections to the water system so that all persons have adequate access.[159]

States should also ensure that both present and future generations can enjoy this right. Therefore, states should develop strategies and programmes in relation to: 1) reducing depletion of water resources through unsustainable extraction, diversion and damming; 2) reducing and eliminating contamination of watersheds and water-related ecosystems by substances such as radiation, harmful chemicals and human excreta; 3) monitoring water reserves; 4) ensuring that proposed developments do not interfere with access to adequate water; 5) assessing the impacts of action that may impinge upon water availability and natural-ecosystems watersheds, such as climate change, desertification and increased soil salinity, deforestation and loss of biodiversity; 6) increasing the efficient use of water by end-users; 7) reducing water waste in its distribution; 8) response mechanisms for emergency situations; and 9) establishing competent institutions and appropriate institutional arrangement to carry out the strategies and programmes.[160]

States also need to guarantee that water is affordable for all. To meet this obligation states may implement the following measures: 1) a range of appropriate low-cost techniques and technologies; 2) appropriate pricing policies, including free or low cost water; and 3) income supplements or subsidies. Payment for water services must be

[156] Asbjørn Eide, 'Economic, Social and Cultural Rights as Human Rights', in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A textbook* (2 revised edn, Martinus Nijhoff Publishers, Dordrecht 2001) 24.
[157] UN CESCR, 'General Comment 15, the right to water' (2002) UN Doc. E/C.12/2002/11, para 26.
[158] Malcolm Langford, 'The United Nation Concept of Water as a Human Rights: A New Paradigm for Old Problems?'(2005) 21 (2) Water Resources Development 279.
[159] Nicholas McMurry, 'Water privatization: Diminished Accountability' (2011) 2 Human Rights and International Discourse 254.
[160] UN CESCR, 'General Comment 15, the right to water' (2002) UN Doc. E/C.12/2002/11, para 28.

based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including disadvantaged groups. Poorer households should not be disproportionately burdened with water expenses as compared to richer households.[161] According to McMurry, even if water services are privatised, the obligation to fulfil is still a state's responsibility. Therefore, states must be allowed to change regulations as they see fit where it is necessary to fulfil the right to water, for instance when there is a significant alteration of the available resources. Thus, it is important that corporations are encouraged to refrain not only from infringing human rights directly but also from impeding the state's fulfilment of its obligations.[162]

It has been considered that the obligation to fulfil only entails an obligation of the state to provide to its citizens. However, the state's first obligation is to facilitate the conditions for the realisation of the right to water. The UN Special Rapporteur on the human right to water and sanitation has asserted that the human right to water does not require states to directly provide individuals with water and sanitation. Their primary obligation is to create an environment conducive to the realisation of human rights. Individuals are expected to contribute with their own means. Only in certain conditions, such as extreme poverty or natural disaster, when people, for reasons beyond their control, are genuinely unable to access water and sanitation through their own means, is the state obliged to actually provide services.[163] It is then an obligation of the state to satisfy the right to water for those who cannot do it by themselves. It is important that a state in its plans and programmes gives priority to minorities and indigenous peoples that often suffer from lack of access to basic services.[164]

The UN High Commissioner for Human Rights indicates that the obligation to fulfil can be disaggregated into the obligations to facilitate, promote and provide. The obligation to facilitate requires states to take positive measures to assist individuals to access safe drinking water and sanitation. The obligation to promote obliges the state to take steps to ensure that there is appropriate education about hygiene, notably concerning hygienic use of water and the protection of water. The obligation to provide demands that states ensure access to safe drinking water and sanitation for individuals when they are unable, for reasons beyond their control, to do so themselves through the means at their disposal.[165]

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[161] UN CESCR, 'General Comment 15, the right to water' (2002) UN Doc. E/C.12/2002/11, para 28.
[162] Nicholas McMurry, 'Water privatization: Diminished accountability' (2011) 2 Human Rights and International Discourse 254-255.
[163] Catarina the Albuquerque, Frequently Asked Questions, UN Special Rapporteur on the human rights to water and sanitation <http://www.ohchr.org/Documents/Issues/Water/FAQWater_en.pdf> accessed 17 September 2013.
[164] Aniza Garcia, *El Derecho Humano al Agua* (Editorial Trotta, Madrid 2008) 209-210.
[165] HRC, 'Report of the United National High Commissioner for Human Rights on the Scope and content of the Relevant Human Rights Obligations related to Equitable Access to Safe Drinking Water and Sanitation under International Human Rights Instruments', 16 August 2007, UN Doc. A/HRC/6/3, para 41.

2.4.1.4. Core obligations

The CESCR has declared that state parties have the obligation to ensure the satisfaction of, minimum essential levels of each of the rights enunciated in the ICESCR, known as 'core obligations'.[166]

The following are the core obligations in relation to the right to water, which are of immediate effect[167]:

a) *To ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease;*

b) *To ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups;*

c) *To ensure physical access to water facilities or services that provide sufficient, safe and regular water; that have a sufficient number of water outlets to avoid prohibitive waiting times; and that are at reasonable distance from household;*

d) *To ensure personal security is not threatened when having to physically access to water;*

e) *To ensure equitable distribution of all available water facilities and services;*

f) *To adopt and implement a national water strategy and plan of action addressing the whole population; the strategy and plan of action should be devised, and periodically reviewed, on the basis of a participatory and transparent process; it should include methods, such as right to water indicator and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all disadvantaged or marginalized groups;*

g) *To monitor the extent of the realization, or the non-realization, of the right to water;*

h) *To adopt relatively low-cost targeted water programmes to protect vulnerable and marginalized groups;*

[166] UN CESCR, 'General Comment 3, the nature of States parties obligations (Art. 2, par. 1)' fifth session 14 December 1990, para 10.
[167] UN CESCR, 'General Comment 15, the right to water' (2002) UN Doc. E/C.12/2002/11, para 37.

i) To take measures to prevent, treat and control diseases linked to water, in particular ensuring access to adequate sanitation.[168]

The CESCR emphasises that it is incumbent on state parties, and other actors in a position to assist, to provide international assistance and cooperation, especially of an economic and technical nature, to enable developing countries to fulfil their core obligations.[169] Many states, particularly developing countries, are unable immediately to guarantee these core obligations, given the high cost and complexity of developing water infrastructure.[170] Therefore, it is completely understandable that the CESCR emphasises that international assistance is essential to achieve these goals.

However, the CESCR also affirms that states cannot justify their non-compliance with core obligations because they are non-derogable obligations.[171] It seems that the CESCR is sending a confusing message. First, it says that economic and social rights are of progressive realisation, to the maximum of a state's available resources. But then, it lists a number of costly obligations with immediate effect, which will be particularly difficult for developing countries to implement, such as core obligations a) and c). Also, on the one hand it says that it is compelling states to assist developing countries to enable them to fulfil their core obligations, which means that it may not be possible for those states to fully comply with core obligations without help. On the other hand it says that core obligations are non-derogable and their non-compliance cannot be justified. It should be noted that the CESCR affirmed in General Comment 3 that before a state party can attribute its failure to meet its minimum core obligations to a lack of available resources, it must demonstrate that it has made every effort to use all resources at its disposal to satisfy, as a matter of priority, those obligations. In other words, there is an exception for the non-compliance with core obligations, which must be proven.

These statements raise the following questions: are core obligations regarding the right to water in fact non-derogable, given that some developing states need international assistance to fulfil some of the core obligations that are of immediate effect but also extremely costly? Should developed states not be under a stricter obligation to support and assist developing countries economically and technically to comply with their core obligations regarding the right to water? I agree with McCaffrey when he says that 'it is therefore not clear that the Committee's approach of placing heavy obligations upon these countries and then, in effect, imposing at least moral responsibility upon

[168] UN CESCR, 'General Comment 15, the right to water' (2002) UN Doc. E/C.12/2002/11, para 37.
[169] UN CESCR, 'General Comment 3, the nature of States parties obligations (Art. 2, par. 1)' fifth session 14 December 1990, UN CESCR, 'General Comment 15, the right to water' (2002) UN Doc. E/C.12/2002/11, para 38.
[170] Stephen C. McCaffrey, 'The Human Right to Water' in Edith Brown Weiss, Laurence Boisson de Chazournes and Nathalie Bernasconi-Osterwalder (eds), *Fresh Water and International Economic Law* (OUP, Oxford 2005) 110.
[171] UN CESCR, 'General Comment 15, the right to water' (2002) UN Doc. E/C.12/2002/11, para 40.

developed states and international financial institutions to make it possible to fulfil them, is a sound one'.[172]

It is time to strengthen international assistance and cooperation, so the realisation of the human right to water in those countries that need economic and technical assistance can obtain that assistance. In other words, international human rights obligations (see section 6.2) may need to be reinforced.

2.5. Conclusions

Since the 1960's there has been a growing concern about the increasing use of freshwater and the consequences that this causes for humans, particularly since there is a close connection between water and human survival and development.

Due to this interconnection between humans and water, government officials and various experts from different fields, while attending international conferences, began to recognise that everyone should have the right of access to drinking water of good quality and sufficient quantity as a basic human right. This implies protecting water resources to satisfy human needs, as well as ecosystems. Therefore, the human right to water started to emerge through a number of soft law documents, inter alia, international declarations, action plans and agendas. Owing to the large number of people that still lack access to drinking water, governments also agreed on some goals to reduce the portion of the population without access to drinking water.

This right began to materialise through the most recently adopted human rights conventions, which address special groups of people, such as the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women. Access to drinking water is an essential element in protecting the rights of people covered under these Conventions.

Likewise, legal experts on international water law, such as the members of the ILA and the International Law Commission, concluded that states must give priority to uses of water that satisfy vital human needs when sharing international freshwater resources. Those needs are essentially the same as the needs that the human right to water is supposed to satisfy. Consequently, the human right to water is implicitly acknowledged in international water law.

It was not until 2002 that the human right to water was finally identified at the international level as an independent right. The CESCR defines in General Comment 15

[172] Stephen C. McCaffrey, 'The Human Right to Water' in Edith Brown Weiss, Laurence Boisson de Chazournes and Nathalie Bernasconi-Osterwalder (eds) *Fresh Water and International Economic Law* (OUP,
Oxford 2005) 111.

the main elements that compose this right: availability, quality and accessibility (physical accessibility, affordability, participation). It declares that the right to water is implicitly included in the ICESCR and emanates from the right to an adequate standard of living and is closely connected with other human rights, such as the right to health, the right to life and the right to human dignity. In general, this right guarantees to all persons access to sufficient quantities of affordable and safe drinking water to satisfy personal and domestic uses. This right is guaranteed to everyone and must be realised without discrimination. General Comment 15 gives freedom to states to determine the most adequate approach to realise this right. For instance, in determining what is good quality water, or a sufficient amount of water, General Comment 15 recommends, but does not require, that states follow the standards adopted by the WHO. Each state needs to establish such standards according to its own economic, social, and environmental conditions. Concerning affordability, General Comment 15 lists a number of measures that could be adopted to ensure economic access to drinking water, including subsidies. It allows states to choose whether drinking water services are privately or publicly provided.

General Comment 15 also identifies the obligations that fall on state parties to implement the human right water: the obligations to respect, to protect and to fulfil. It is understood that economic, social and cultural rights such as the right to water are of progressive realisation; however, according to the CESCR states should at the very least comply with the core obligations, which take immediate effect.

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CHAPTER III

3. ACKNOWLEDGMENT OF THE HUMAN RIGHT TO WATER AT THE INTERNATIONAL LEVEL

3.1. Introduction

Safe drinking water is indispensable for human survival. Nevertheless, a human right to water has not been explicitly incorporated in any of the international conventions on human rights. Due to the vital character of this resource, drinking water is an essential element for the realisation of a number of recognised human rights. In fact, some international conventions explicitly refer to drinking water as part of other human rights acknowledged in those conventions.

The question that has emerged and been discussed in the last decades is whether access to safe drinking water should be guaranteed as an extension of other rights or whether it should be recognised as an independent right in itself. An independent right to water would provide a more comprehensive protection, and it would support other rights for which water is an essential element. An independent right to water would also protect all people, instead of particular groups, as proposed by the CESCR in General Comment 15.

This chapter focuses on analysing the implicit recognition of the right to water in international human rights conventions, to determine from which rights it derived. The mechanisms for monitoring compliance with the international human rights conventions, reporting procedures and complaints procedures will also be examined. Reports submitted by state parties on the measures adopted for the implementation of the international human rights conventions can indicate which rights might incorporate access to drinking water. Compliance procedures are a useful tool to understand which rights are deemed to be violated by lack of access to safe drinking water.

3.2. Recognition of the right to water

This section focuses on analysing whether the human right to water is recognised in international human rights conventions. On the one hand, the most recent conventions on human rights adopted under the auspices of the UN, with the exception of the Convention on Enforced Disappearance, explicitly mention access to drinking water. On the other hand, interpretations of the rights embedded in the different international human rights conventions, may indicate that the human right to water is implicitly recognised therein.

3.2.1. Implicit recognition of the right to water

The human right to water is not expressly provided in any international human rights convention, nor is there even any reference to water in the International Bill of Human Rights, which is formed by the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the ICESCR.[173] Nevertheless, the right to water could be understood to derive from them as a subordinated or implicit right.[174]

3.2.1.1. Universal Declaration of Human Rights (1948)

Adopted in 1948, the UDHR[175] proclaims in its article 25(1) that:

> *'[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness and disability, widowhood, old age or other lack of livelihood in circumstances beyond his control*'.

This article is composed of two parts, one related to the health care rights (rights to food, clothing, housing and medical care) and another to social security benefits. The former four rights have been called 'basic rights' because their enjoyment is essential to the enjoyment of other rights. Due to their fundamental character they are 'everyone's minimum reasonable demands upon the rest of humanity'.[176] However, the inclusion of these four fundamental rights during the drafting of the UDHR was almost lost due to the UN Human Rights Commission's[177] desire for brevity.[178] For instance, during the drafting process Geoffrey Wilson, the UK representative, said that 'medical care' was covered twice; once by the words 'standard of living' and again by the words 'health and well-being'; likewise housing – as well as food and clothing - was covered by 'well-being of himself and his family'.[179] This statement suggests that there were some

[173] Philip Alston and Ryan Goodman, *International Human Rights, The Successor to International Human Rights in Context: Law, Politics and Morals* (OUP, Oxford 2013) 139.
[174] Stephen C. McCaffrey, 'The Human Right to Water' in Edith Brown Weiss, Laurence Boisson de Chazournes and Nathalie Bernasconi-Osterwalder (eds), *Fresh Water and International Economic Law* (OUP, Oxford 2005) 95.
[175] UNGA Resolution 217A(III) (1948), UN Doc. A/810
[176] Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press, Philadelphia 1999) 191-192.
[177] The UN Human Rights Commission was created by the Economic and Social Council to produce the Declaration. Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press, Philadelphia 1999) 4.
[178] Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press, Philadelphia 1999) 192.
[179] Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press, Philadelphia 1999) 196.

minimum subsidiary rights considered to be implicit in the right to an adequate standard of living. Thus, the rights expressly enumerated in this article were not intended to exhaustively list all the elements that form an adequate standard of living. The drafters clearly had a desire for brevity.

In fact, the inclusion of water as an essential element of an adequate standard of living was not mentioned during the drafting of the Article 25 (1) of the UDHR. However, it has been argued that water was included by necessary implication, since water, even more than food, is essential to health and well-being.[180] Moreover, water is necessary to produce and to prepare food.[181] It has also been argued that the right to water could derive from the right to an adequate standard of living, since the word 'including' indicates that the list of items in the article is not exhaustive, but rather indicative of the component elements of an adequate standard of living.[182]

The difficulty in deriving the right to water from an article of the UDHR is its character as a non-legally binding instrument[183]. States will accept to invoke the UDHR as the only legal basis for the recognition of a new human right.[184] However, many of the rights embraced in the UDHR are acknowledged as customary international law; these rights are recognised in practice by a large number of countries. Moreover, these rights are enshrined in two international legal treaties, the ICCPR and the ICESCR[185], as well as in a large number of national constitutions.[186]

[180] Stephen C. McCaffrey, 'The Human Right to Water' in Edith Brown Weiss, Laurence Boisson de Chazournes and Nathalie Bernasconi-Osterwalder (eds), *Fresh Water and International Economic Law* (OUP, Oxford 2005) 96.
[181] Stephen C. McCaffrey, 'The Human Right to Water' in Edith Brown Weiss, Laurence Boisson de Chazournes and Nathalie Bernasconi-Osterwalder (eds), *Fresh Water and International Economic Law* (OUP, Oxford 2005) 96.
[182] Peter Gleick, 'The Human Right to Water' (1999) 15 Water policy 5. See also Stephen C. McCaffrey, 'The Human Right to Water' in Edith Brown Weiss, Laurence Boisson de Chazournes and Nathalie Bernasconi-Osterwalder (eds), *Fresh Water and International Economic Law* (OUP, Oxford 2005) 96.
[183] Ian Brownlie, *Principles of Public International Law* (6th edn OUP, Oxford 2003) 534-535; Antonio Cassese, *International Law* (OUP, Oxford 2001) 358.
[184] Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995/1996) 25 Georgia Journal of International and Comparative Law 289, 290, 299, 305, 315 and 317.
[185] Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Publishing, Oxford 2009) 4.
[186] Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995/1996) 25 Georgia Journal of International and Comparative Law 289.

3.2.1.2. International Covenant on Civil and Political Rights (1966)

The right to water can also be derived from two rights embraced in the ICCPR[187]. The right to water can be implied from the right to life. Article 6, paragraph 1 of the ICCPR reads:

> '*[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life*'.

To guarantee the right to life, as any other human right, states must comply with both negative as well as positive obligations. Therefore, states shall take positive measures to guarantee the enjoyment of the right. The Human Rights Committee (HRCom) has said that:

> '*the expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics*'.[188]

Thus, Article 6 of the ICCPR, by establishing a right to life, places a duty on states to adopt affirmative measures to ensure access to the means of survival.[189]

When the right to life is broadly interpreted so as to require states to take positive measures to protect this right, and water being an essential element for survival, it should be inferred that states must also take action to guarantee access to water in order to protect the right to life. According to McCaffrey, article 6 ICCPR can be interpreted to mean that the right to life embraces the right to water sufficient to sustain life, since the ICCPR imposes an immediate obligation to respect and to ensure the rights it proclaims.[190] And because the ICCPR is immediately enforceable, it has been asserted that the right to water should be best placed under the right to life.

However, the right to life may still be seen exclusively as a civil right, which does not necessarily include 'welfare rights', nor impose the obligation to take measures to ensure access to adequate sustenance. Furthermore, although there is a rigorous immediate obligation to implement the rights under the ICCPR, it is doubtful whether the implementation of the right to life, broadly understood, is economically possible for

[187] International Covenant on Civil and Political Rights (adopted on 16 December 1966, entered into force on 23 March 1976) 999 UNTS 171.
[188] UN HRCom 'General Comment No. 6 the right to life' (1982) UN Doc. HRI/GEN/1/Rev.9, p 177.
[189] HRC 'Report of the United Nations High Commissioner for Human Rights on the Scope and Content of the Relevant Human Rights Obligations Related to Equitable Access to Safe Drinking Water and Sanitation Under International Human Rights Instruments' (2007) UN. Doc. A/HRC/6/3, para 7.
[190] Stephen C. McCaffrey, 'A Human Right to Water: Domestic and International Implications' (1992) 5 (1) The Georgetown International Environmental Law Review 9.

poorer, less developed countries. Therefore, for McCaffrey, 'immediate' obligations are probably related to the exercise of due diligence, or best efforts to obtain some results, which for him could be a way of softening the obligations of states under the ICCPR.[191]

It has been argued that the right to life in article 6 implicitly includes fundamental conditions necessary to support life. This view is bolstered by the HRCom interpretation requiring states to adopt affirmative actions to provide the means of subsistence necessary for life.[192] However, if the right to water is understood to derive from the right to life, it would only ensure the minimum amount of water necessary to support life.[193] Therefore, quantities of water necessary for uses other than survival, such as personal hygiene or cleaning, would not be ensured under the right to life.

The right to water can also derive from the prohibition on torture or inhuman treatment. Article 7 of the ICCPR reads:

> '*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation'.*

Although, the prohibition on torture is not generally viewed – at least in the literature – as a right from which the right to water might derive, the HRCom has already considered and apparently accepted this view. The HRCom when considering a communication from an individual regarding his conditions of arrest declared that the deprivation of food and water, as well as the denial of medical attention, amounts to cruel and inhumane treatment within the meaning of article 7.[194] If the right to water is understood to derive from article 7 of the ICCPR, according to the actual case law this right could be limited to imprisoned or detained people.

3.2.1.3. International Covenant on Economic, Social and Cultural Rights (1966)

The right to water can also be derived from the ICESCR.[195] A number of different provisions of the ICESCR provide a basis for the recognition of the right to water, such as the right to food, the right to health, and the right to an adequate standard of living.

The right to food is incorporated in article 11(2), which states that:

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[191] Stephen C. McCaffrey, 'A Human Right to Water: Domestic and International Implications' (1992) 5 (1) The Georgetown International Environmental Law Review 13.
[192] Peter Gleick, 'The Human Right to Water' 1999 (15) Water policy 6.
[193] Erik B. Bluemel, 'The Implications of Formulating a Human Right to Water' (2004) 3 Ecology Law Quarterly 968.
[194] UN HRCom, *Essono Mika Miha v. Equatorial Guinea*, Communication No. 414/1990, 8 July 1994, para 6.4.
[195] International Covenant on Economic, Social and Cultural Rights (adopted on 16 December 1966, entered into force on 3 January 1976) 993 UNTS 3.

'The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need'.

Of course, water is necessary for food production as well as for food preparation. However, critics have noted that this right would not guarantee water for all, since water could simply be provided at the place where food is produced, and the food can then shipped elsewhere.[196]

The right to water can also derive from the right to the highest attainable standard of health (article 12) and from the right to an adequate standard of living (article 11 (1)) in the ICESCR. These rights are most widely-accepted by scholars as sources of a right to water.

One of the biggest concerns with the subordination of the right to water under the rights to health and to an adequate standard of living is the justiciability of economic, social and cultural rights. The ICESCR does not explicitly require a judicial remedy for violations of these rights. However, recent case law[197] has proven that economic and social rights are in some cases judicially enforceable.

Arguably, the right to water may derive from the right to health enshrined in article 12 of the ICESCR. This article reads:

[196] Erik B. Bluemel, 'The Implications of Formulating a Human Right to Water' (2004) 3 Ecology Law Quarterly 957 - 958.

[197] Concerning the right to health see Constitutional Court of South Africa. Case Minister of Health and Others v Treatment Action and Campaign and Others (CCT 8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (5 July 2002) <http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZACC/2002/15.html&query=title%28minister%20of%20health%20v%20treatment%20action%20campaign%29>. Colombian Constitutional Court, T-1182 of 2008.
Concerning the right to housing see Constitutional Court of South Africa. Case Government of the Republic of South Africa and Others v Grootboom and Others (CCT 11/00) [2000] ZACC 19; 2001 (1) SA 46; 200 (11) BCLR 1169 (4 October 2000).

'*1. The States parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the health development of the child;

b) The improvement of all aspects of environmental and industrial hygiene;

c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

d) The creation of conditions which would assure to all medical services and medical attention in the event of sickness'.

Clean and safe water is an essential element to health. It is indispensable to reduce the rate of infant mortality by dehydration and waterborne diseases. Also personal hygiene contributes to the prevention of certain illnesses.[198] Thus, the right to water inexorably derives from the right to health, as the minimum amounts of safe water for drinking, cooking and hygiene are indispensable for attaining the highest standard of health.

In General Comment 14 the CESCR interprets the right to health as 'an inclusive right to extending not only to timely and appropriate health care but also to the underlying determinants of health, such as *access to safe and potable water and adequate sanitation*, an adequate supply of safe food, nutrition and housing…'[199] (Italics added). Equally, the CESCR holds that the right to health embraces a wide range of socio-economic factors that promote a healthy lifestyle, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation.[200]

Likewise, article 11(1) of the ICESCR on the right to an adequate standard of living may effectively guarantee the right to water. Article 11(1) provides that:

'*States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate*

[198] Some diseases are caused through the use of inadequate volumes of water for personal hygiene, for instance, diarrhoeal disease, infectious hepatitis, typhoid, trachoma, and skin and eye infections. Guy Howard and Jamie Bartram, 'Domestic Water Quantity, Service Level and Health', World Health Organization 2003, WHO/SDE/WSH/03.02, p 9.
[199] UN CESCR 'General Comment 14, the right to the highest attainable standard of health' (2000). UN Doc. E/C.12/2000/4, para 11.
[200] UN CESCR 'General Comment 14, the right to the highest attainable standard of health' (2000) UN Doc. E/C.12/2000/4, para 4.

food, clothing and housing, and to the continuous improvement of living conditions'.

In 1991 the CESCR considered that access to water was an essential element of the right to housing, which is one of the rights that compose an adequate standard of living. In General Comment 4 the CESCR affirmed that the right to housing should not be interpreted in a narrow or restrictive sense. Rather it should be seen as the right to live somewhere in security, peace and dignity. Article 11(1) must be read as referring not just to housing but to adequate housing. The CESCR explained that the concept of adequacy is particularly significant in relation to the right to housing since it serves to underline a number of factors that must be considered in determining whether particular forms of shelter constitute 'adequate housing' for the purpose of the ICESCR. The CESCR stressed that *'[a]n adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services'*.[201]

In the following years a broader approach was taken, where it is argued that the list of rights mentioned in article 11 is not an exhaustive one; allowing other elements to be included, such as the right to water. For instance, McGraw argues that the language of this right was borrowed from article 25 of the UDHR, which at the moment of its adoption was focused on the right to social security and not on a delimitation of all the elements essential to an adequate standard of living.[202] As a result, water and other essential elements were not included in this provision.

The CESCR asserts in General Comment 15 that *'the use of the word ''including'' indicates that this catalogue of rights was not intended to be exhaustive. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival'*.[203] According to the CESCR the human right to water evolved from an important element of the right to housing to become an independent right. The CESCR also recognises that the right to water is inextricably related to the right to the highest attainable standard of health (art 12) and the right to adequate housing and adequate food (art 11); and the right to water should be seen in conjunction with other human rights, particularly the right to life and human dignity. The CESCR previously recognised access to water as an essential element of the right to an adequate standard

[201] UN CESCR 'General Comment 4, the right to housing' (1991) UN Doc. E/1992/23, paras 7-8.
[202] George S. McGraw, 'Defining and Defending the Right to Water and its Minimum Core: Legal Construction and the Rile of National Jurisprudence' (Spring/Summer 2011) 127 Loyola University Chicago International Law Review 9-10. Johannes Morsink, *The Universal Declaration of Human Rights, Origins, Drafting and Intent* (University of Pennsylvania Press, Philadelphia 1999) 192 and 199.
[203] UN CESCR 'General Comment 15, the right to water' (2002) UN Doc. E/C.12/2002/11, para 3.

of living, when acknowledging the economic, social and cultural rights of older persons.[204]

The CESCR asserts that the normative content of the right to water contains both freedoms and entitlements. '*The freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interferences, such as the right to be free from arbitrary disconnections or contamination of water supplies. By contrast, the entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water*'.[205]

General Comment 15 is considered one of the most important steps towards the recognition of the right to water as an independent right. The drawback of General Comment 15 is that it is a non-binding interpretation of the rights and obligations established in the ICESCR. Nevertheless, General Comments are interpretations of the ICESCR that have considerable legal weight.[206] One of the positive aspects of General Comment 15 is that it takes a broad approach to the right to water, since its elements must be adequate for the right to human dignity, life and health. In addition, it calls for the realisation of the right in a sustainable manner to guarantee that the right to water can be realised for present and future generations.[207]

It has been argued that the right proclaimed in article 11, although potentially far-reaching in its content, might be less influential in practise since state parties to the ICESCR are not obliged to implement its provisions immediately.[208] Actually, as with all economic and socio-cultural rights, governments only undertake the obligation to achieve the full realisation of these rights progressively over time, according to their available resources. Therefore, whether the right to water derives from one or another right embraced in the ICESCR, its realisation need not be immediately achieved but progressively so.

For this reason some have affirmed that the right to water would be best derived from a right under the ICCPR, given that such rights are immediately effective and enforceable,[209] as opposed to the progressive realisation of the rights embraced in the

[204] UN CESCR 'General Comment No 6 The Economic, Social and Cultural Rights of Older Persons" (1995) Thirteen session, para 32,
[205] UN CESCR 'General Comment 15, the right to water' (2002) UN Doc. E/C.12/2002/11, para 10.
[206] Matthew Craven, The International Covenant on Economic, Social and Cultural Rights, A Perspective on its Development (Clarendon Press, Oxford 1995) 91; Hellen Keller and Leena Grover, 'General Comments of the Human Rights Committee and their legitimacy' in Hellen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies, Law and Legitimacy* (CUP, Cambridge 2012) 129-130
[207] UN CESCR 'General Comment 15, the right to water' (2002) UN Doc. E/C.12/2002/11, para 11.
[208] Stephen C. McCaffrey, 'A Human Right to Water: Domestic and International Implications' 1992 5 (1) The Georgetown International Environmental Law Review 11.
[209] George S. McGraw, 'Defining and Defending the Right to Water and its Minimum Core: Legal Construction and the Role of National Jurisprudence' (Spring/Summer 2001) 127 Loyola University Chicago International Law Review 9.

ICESCR. Indeed, while the ICCPR imposes on states an immediate and unconditional obligation to take the necessary measures to secure the rights recognised therein, [210] the ICESCR imposes on states the obligation to take the necessary measures only to the maximum of their available resources, and thus to progressively achieve the full realisation of the economic, social and cultural rights. [211] Therefore, creating conditional obligations based on state resources. These differences show that depending on the type of right (whether civil and political or economic, social and cultural) from which the right to water derives, states' obligations may differ, particularly concerning their immediate or progressive realisation. However, whether the right to water is subsumed under a civil and political right with immediate obligations, or under an economic, social and cultural right with progressive obligations, states need to make costly investments in infrastructure to achieve the realisation of this right for all. Therefore, even if the right to water is considered to be subsumed under the rights in the ICCPR, with immediate obligations, less developed states that lack resources may not be able to guarantee this right immediately to all.[212]

In addition, the ICCPR article 2(3) explicitly establishes the right to obtain an effective remedy when a violation to the rights enshrined in the Covenant has occurred; in contrast this right has not been explicitly established in the ICESCR.[213] For these reasons, the possibility to claim an effective remedy for the full realisation of the economic, social and cultural rights has not always been obvious. Nevertheless, this situation will likely change with the recent adoption of the Optional Protocol to the International Covenant on Economic Social and Cultural Rights[214], which allows individuals to present a complaint regarding the violation of a right set forth in the ICESCR. Thus, determining from which international treaties and from which specific human rights the right to water derives is essential to understanding the possible enforcement mechanisms and the remedies available in case of violations.

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[210] ICCPR, Article 2 "(2). Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant".

[211] ICESCR, Article 2 "1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures". Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights, A perspective on its Development* (Clarendon Press, Oxford 1995) 106.

[212] Stephen C. McCaffrey, 'A Human Right to Water: Domestic and International Implications' 1992 5 (1) The Georgetown International Environmental Law Review 13; Stephen C. McCaffrey, The Human Right to Water', in Edith Brown Weiss, Laurence Boisson de Chazourness and Natalie Bernasconi-Osterwalder (eds) *Fresh Water and International Economic Law* (OUP, Oxford 2005)108.

[213] Henry J. Steiner and Philip Alston, *International Human Rights in Context, Law, Politics and Morals* (2nd edn OUP, Oxford 2000) 248; Victor Abramovich and Christian Courtis, *Los derechos Sociales como Derechos Exigibles* (2nd edn Editorial Trotta, Madrid 2004) 64.

[214] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted on 10 December 2008, entered into force on 5 May 2013) C.N.869.2009.TREATIES 34.

While obstacles to the establishment of the human right to water as a binding obligation have existed, particularly due to its absence in the universal human rights conventions, this right can still be enforced as a subordinate right through each of the rights described above.[215] However, this may lead to ineffective and inconsistent implementation of the right to water.[216] If the right to water is considered to derive from different human rights, this could lead to the guarantee of different quantities of water. For instance, one quantity of water is necessary to protect the right to life, while another quantity for a life with dignity, and another quantity for the right to food, and yet another quantity for the right to health. In any event, if the right to water is considered as a derivate right, it is best placed under the right to an adequate standard of living, since it will cover the use of water for most basic human needs, being the broadest human right under which access to water can be subsumed.

The best scenario would be to understand the right to water as an independent right, as suggested by the CESCR, that includes all aspects or conditions for which the resource is needed, such as drinking, personal hygiene, cleaning, cooking, and even cultural purposes,[217] contributing in this way to the enjoyment of all other rights for which water is necessary. Indeed, recognising an independent right to water under international law would give more clarity and consistency to states' obligations, which would also lead to clearer remedies in case of violations of the right.

3.2.2. Explicit recognition of the right to water

A number of international treaties on human rights have explicitly mentioned the obligation to take appropriate measures to ensure access to clean water and sanitation. Not surprisingly these are the most recently adopted treaties on human rights: the Convention on the Elimination of All forms of Discrimination against Women[218], the Convention on the Rights of the Child[219], and the Convention on the Rights of Persons

[215] Stephen C. McCaffrey, 'A Human Right to Water: Domestic and International Implications' 1992 5 (1) The Georgetown International Environmental Law Review 12.
[216] Erik B. Bluemel, 'The Implications of Formulating a Human Right to Water' (2004) 3 Ecology Law Quarterly 957 - 958.
[217] To understand the importance of taking into account the social and cultural value of water see Luis Carlos Boub Concha, 'The Right to Water: Understanding its Economic, Social and Cultural Components as Development Factors for Indigenous Communities', (2012) 9 (17) International Journal on Human Rights.
[218] Convention on the Elimination of All forms of Discrimination against Women (adopted on 18 December 1979, entered into force on 3 September 1981) 1249 UNTS 13. Article 14, para 2 says: "States Parties shall take all appropriate measure to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: (h) to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.
[219] Convention on the Rights of the Child (adopted on 20 November 1989, entered into force on 2 September 1990) 1577 UNTS 3. Article 24, para 2 says: "States Parties shall pursue full implementation

with Disabilities[220]. Likewise, guidelines and resolutions of the United Nations also explicitly recognise the human right to water.

3.2.2.1. Convention on the Elimination of All Forms of Discrimination against Women (1979)

The deliberations on the Convention on the Elimination of All Forms of Discrimination against Women started in 1974 when the Commission on the Status of Women (hereinafter CSW) decided to draft such a text. Deliberations regarding such a draft among member states of the UN, the CSW and the UN Secretary General lasted from 1976 to 1979. In December 1980, the General Assembly adopted Resolution 35/140 calling on all states to become a party to the Convention.[221]

For the first time in history an explicit reference to water was included in an international human rights convention. Article 14 of the Convention lists water supply as one of the necessary elements to the enjoyment of an adequate standard of living. Article 14 reads as follows:

> *'1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measure to ensure the application of the provisions of the present Convention to women in rural areas.*
>
> *2. States Parties shall take all appropriate measure to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:*

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of this right and in particular, shall take appropriate measure: (c) to Combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provisions of adequate nutritious food and clean drinking water, taking into consideration the dangers and risks of environmental pollution".

[220] Convention on the Rights of Persons with Disabilities (adopted on 13 December 2006, entered into force on 3 May 2008) UN General Assembly Resolution 61/106. Article 28 (2) says: Adequate standard of living and social protection. "States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measure: (a) to ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs".

[221] Lars Adam Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women*, (International Studies in Human Rights Vol. 29, Martinus Nijhoff Publishers, Dordrecht 1993) 9-12.

a) To participate in the elaboration and implementation of development planning at all levels;

b) To have access to adequate health care facilities, including information, counselling and services in family planning;

c) To benefit directly from social security programmes;

d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency;

e) To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self employment;

f) To participate in all community activities;

g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;

h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications'.

Scholars have debated whether the rights enshrined in this article apply merely to the particular group of rural women since they are the only ones explicitly mentioned therein. To assess the reasons for explicitly including a reference to water supply in this provision, and to understand its meaning, it is necessary to review the *travaux préparatoires* of the Convention with regard to article 14. The *travaux préparatoires* reveal that during the deliberation on the draft text of the Convention, specific rights devoted to women in rural areas were suggested only in the fifth draft. These rights were proposed because it was thought that this group of women was not sufficiently considered in the draft of the Convention.[222]

The inclusion of paragraph (2) (h) of article 14 of the Convention was proposed by Bangladesh, Ghana, Guyana, India, Kenya, New Zealand, Sweden and the United Kingdom. [223] Its inclusion seems to have been uncontroversial. Nevertheless, the representative of the Netherlands expressed that she would like to see a similar provision included for all women in the article dealing with other aspects of economic

[222] Lars Adam Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women*, (International Studies in Human Rights Vol. 29, Martinus Nijhoff Publishers, Dordrecht 1993) 153-154.

[223] Lars Adam Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women*, (International Studies in Human Rights Vol. 29, Martinus Nijhoff Publishers, Dordrecht 1993) 157.

and social life. The Chairman said that if it was intended to guarantee these rights to urban woman as well, provisions to this effect should be included among the general provisions of the Convention.[224] Although such a provision as the one proposed by the Chairman was not included in the Convention, it is very difficult to conclude that the rights enumerated in article 14 are only applicable to rural women and that urban women should not benefit from them.

A clarification on the inclusion of the right to access to adequate health care facilitates for rural women was made by the representative of the United Nations Branch for the Advancement of Women, who indicated that 'research showed that health expenditures intended for the most needy, especially for rural women, did not reach them and remained at middle levels'.[225] A comparable assessment could have been made, at the time of the adoption of the Convention, regarding the right to an adequate standard of living, since states devote much greater expenditures to infrastructure, such as electricity, water, sanitation, and transport, in urban areas. Therefore, by linking the right to an adequate standard of living with rural women, states are obliged to make bigger investments on rural areas to benefit women living in those areas.

A close reading of article 14 indicates that the reference to rural women was made to give more attention to the particular circumstances under which they live and the role they play in the economic survival of their families, which differs from that of urban women. The rights embraced in article 14 are intended to give greater protection to rural women, but there is no indication that non-rural women are excluded from those rights, which include the right to enjoy adequate living conditions that incorporates water supply.

Furthermore, under General Recommendation 24 (1999) of the Committee on the Elimination of Discrimination against Women (hereinafter CEDAW), which is the authoritative interpreter of the Convention, states reporting on measures taken to comply with the right to health under article 12 [226] are urged to recognise its interconnection with other articles in the Convention that have a bearing on women's health. Among them, article 14 (2)(h) is included, which obliges state parties to take all appropriate measures to ensure adequate living conditions, particularly housing,

[224] 'Report of the Working Group of the Whole on the Drafting of the Convention on the Elimination of Discrimination against Women' (2 March 1979) UN Doc. A/34/60, para 171-172.
[225] Lars Adam Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women*, (International Studies in Human Rights Vol. 29, Martinus Nijhoff Publishers, Dordrecht 1993) 158-159.
[226] Convention on the Elimination of All Forms of Discrimination against Women, Article 12 "1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
2. Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation".

sanitation, electricity and water supply, all of which are critical for the prevention of diseases and the promotion of good health.[227] Although water is essential for the satisfaction of the right to health, reference to access to drinking water is not found in article 12 of this Convention, nor was access to water mentioned during the discussion on the adoption of this provision in the *travaux préparatoires*.

It is understandable that an explicit reference is made to the measures that states need to take to guarantee adequate living conditions, particularly for rural women, since this group of women is living in lower conditions than urban women. However, if adequate living conditions are essential for the protection of the right to health, which is guaranteed to all women, then the right to adequate living conditions should also be guaranteed to all women, regardless whether they live in rural or urban areas.

3.2.2.2. Convention on the Rights of the Child (1989)

The idea to draft a Convention on the Rights of the Child was proposed by the Polish Government to the UN Commission on Human Rights in 1978. Then the drafting process started in 1979 and ended in 1989. The Convention on the Rights of the Child was unanimously adopted by the UN General Assembly on 20 November 1989.[228]

The Convention explicitly refers to water as part of the right to the highest attainable standard of health. The wording of the text is even more precise than the one in the Convention on the Elimination of All Forms of Discrimination against Women, since it refers to 'clean drinking water', giving a particular quality to this resource. Article 24 of the Convention on the Rights of the Child reads as follows:

> *'1. States parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.*
>
> *2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measure:*
>
> *a) To diminish infant and child mortality;*
>
> *b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;*

[227] UN Committee on the Elimination of Discrimination against Women, "General Recommendation No 24 (1999)", UN Doc. HRI/GEN/1/Rev.9 (vol. II) 364.
[228] Sharon Detrick, 'Compilation of the Travaux Préparatoires', in Sharon Detrick (ed) *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"* (Martinus Nijhoff Publishers, Dordrecht 1992) 1.

c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious food and clean drinking water, taking into consideration the dangers and risks of environmental pollution;

c) To ensure appropriate pre-natal and post-natal health care for mothers;

d) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;

e) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditions practices prejudicial to the health of children.

4. States parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries'.

To assess the reasons that lead to the inclusion of drinking water in this Convention, its *travaux préparatoires* will be reviewed. The first time that the expression 'clean drinking water' was mentioned during the drafting process was in a proposal India submitted to revise the article that contained the right to health. India indicated that the proposal was intended to cover existing situations, particularly in developing countries, where a significant part of the population ran the risk of serious disease, due to economic and social problems. Children were especially vulnerable and needed special protection.[229]

As part of the proposal, India suggested the inclusion of a new paragraph (c) where nutritious foods and clean drinking water are used to combat disease and malnutrition, which was adopted in 1988 by the Working Group at the first reading. The proposal was aimed at the protection of the life of the child.[230] According to the *travaux préparatories* there was no opposition to the inclusion of the aforementioned phrase. Thus, signatory

[229] Sharon Detrick, 'Compilation of the Travaux Préparatoires', in Sharon Detrick (ed) *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"* (Martinus Nijhoff Publishers, Dordrecht 1992) 353.
[230] Sharon Detrick, 'Compilation of the Travaux Préparatoires', in Sharon Detrick (ed) *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"* (Martinus Nijhoff Publishers, Dordrecht 1992) 354.

states recognise the importance of providing clean water drinking to children to avoid the risk of serious diseases and even death.

States are required to provide clean drinking water as a measure to implement the right to health, particularly, since the adopted text uses the word 'shall' take appropriate measures, which clearly indicates an obligation for the state. According to the *travaux préparatoires* clean drinking water is an essential element to implement the right to health and to protect life.

The interpretation of the content of the human right to health of the child (article 24), has recently been reviewed by the Committee on the Rights of the Child (hereinafter CRC) through its General Comment 15.[231] In this General Comment the CRC states that children's right to health contains a set of freedoms and entitlements. The latter includes access to a range of facilities, goods, services and conditions that provide equality of opportunity for every child to enjoy the highest attainable standards of health.

According to the CRC the second paragraph of article 24 refers to the process of identifying and addressing other issues relevant to children's right to health, to recognise priority health problems and responses. This means that the provision of clean drinking water is recognised as a priority, since the lack of drinking water or its bad quality can cause malnutrition, diarrhoea and other water-related diseases. The CRC also recognises in its General Comment 15 that safe and clean drinking water is essential for the full enjoyment of life and all other human rights. According to this General Comment the '*authorities responsible for water and sanitation should recognize their obligation to help realize children's right to health, and actively consider child indicators in malnutrition, diarrhoea and other water-related diseases and household size when planning can carrying out infrastructure expansion and the maintenance of water services, and when making decision on amounts for free minimum allocation and service disconnection. States are not exempted from their obligation, even when they have privatized water and sanitation*'.[232]

Thus, access to clean drinking water is considered to be essential for the realisation of the children's right to health. Further, as the CRC mentioned, it is essential for the full enjoyment of all other human rights of children.

3.2.2.3. Convention on the Rights of Persons with Disabilities (2006)

The World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held at Durban, South Africa, in 2001, invited the UN General Assembly to

[231] UN Committee on the Rights of the Child, 'General Comment 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)' (17 April 2013) CRC/C/GC/15.
[232] UN Committee on the Rights of the Child, 'General Comment 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)' (17 April 2013) CRC/C/GC/15, Para 48.

consider drafting an integral and comprehensive convention to protect and promote the rights and dignity of disabled people, including, especially, provisions that address the discriminatory practices and treatment affecting them.[233] Following this invitation the General Assembly decided on 19 December 2001 to establish an Ad Hoc Committee to consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of the persons with disabilities, based on a holistic approach.[234] The discussions on the proposal lasted until the end of 2006 when the Convention on the Rights of Persons with Disabilities was adopted.[235]

This Convention also refers to access to water; however this time incorporated within the right to social protection, embedded in article 28 of the Convention that reads as follows:

> *'Article 28 Adequate standard of living and social protection.*
>
> *1. States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.*
>
> *2. States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures:*
>
> *a) To ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services and other assistance for disability-related needs;*
>
> *b) To ensure access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes;*
>
> *c) To ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability-related*

[233] UNGA, Resolution 56/115 on the Implementation of the world programme of action concerning disabled persons: towards a society for all in the twenty-first century (19 December 2001). <http://www.un.org/esa/socdev/enable/disA56115e1.htm> accessed 10 July 2013. Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related intolerance (31 Auguts -8 September 2001, <http://www.un.org/WCAR/durban.pdf> accessed 11 July 2013.

[234] Enable United Nations, First session of the Ad hoc Committee, 29 July to 9 August 2002, <http://www.un.org/esa/socdev/enable/rights/ahc1.htm> accessed 2 June 2013.

[235] Convention on the Rights of Persons with Disabilities (adopted on 13 December 2006, entered into force on 3 May 2008) 2525 UNTS 3.

expenses, including adequate training, counselling, financial assistance and respite care;

d) To ensure access by persons with disabilities to public housing programmes

e) To ensure equal access by persons with disabilities to retirement benefits and programmes'.

With the aim of knowing the reasons for including access to clean water services in this provision and to understand its meaning, the *travaux préparatoires* of the Convention with regards to article 28 will be reviewed. The right to access to water was mentioned from the beginning of the drafting process of the Convention. Reference to access to water was introduced by states of the Asian and the Pacific region. These states proposed that a number of additional aspects or interpretation of existing rights might be considered for explicit inclusion in the Convention, such as the right of access to basic economic resources, including safe food and water.[236]

During the third session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, access to water was included as part of different aspects of existing rights. For instance, a provision ensuring equal access to public health programmes, including safe, potable water and sanitation, was proposed as part of the right to health. In addition, it was proposed that access to clean water should be included as part of the right of all persons with disabilities to an adequate standard of living.

During the sixth session of the Ad Hoc Committee, it was proposed that the phrase 'persons with disabilities should not be denied food, water and life support' should be included as part of the right to health. This proposal was supported by a number of delegations.[237] Then the Special Rapporteur on the right to health submitted a note concerning the right to health to the Ad Hoc Committee for its seventh session. In his

[236] Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 'Bangkok recommendations on the elaboration of a comprehensive and integral international convention to promote and protect the right and dignity of persons with disabilities' (17-27 June 2003) A/AC.265/2003/CRP/10 <http://www.un.org/esa/socdev/enable/rights/a_ac265_2003_crp10.htm> accessed 6 May 2013. Also Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, "Compilation of Proposals for a Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities", (16-27 June 2003) <http://www.un.org/esa/socdev/enable/rights/a_ac265_2003_crp13.htm> accessed 6 May 2013.

[237] Ad Hoc Committee on a Comprehensive and Integral Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 'Report of the Ad Hoc Committee on a Comprehensive and Integral Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities on its sixth session', (17 August 2005) A/60/266 <http://www.un.org/esa/socdev/enable/rights/ahc6reporte.htm> accessed 5 May 2013.

note the Special Rapporteur stated that the draft convention rightly includes the same formulation of the right to health as in the ICESCR and the Convention on the Rights of the Child and other key international instruments. He also affirmed that *'[i]t is widely accepted that this formulation includes access to health care services as well as access to those services relating to the underlying determinants of health, such as adequate sanitation and safe drinking water. Indeed, the detailed provisions of the ICESCR and CRC explicitly include both health care services and the underlying determinants of health. For example, article 24(2)(b) of CRC refers to "provision of necessary medical assistance and health care", while article 24(2)(c) refers to "clean drinking water"'.*[238]

According to the report of the Seventh session of the Ad Hoc Committee, a precise reference to drinking water was no longer found as part of the right to health in the working text of the Convention. It can be assumed that this modification was made based on the note submitted by the Special Rapporteur of the right to health, who affirmed that access to drinking water is implicit in the right to health as adopted in the ICESCR and the Convention on the Rights of the Child, and that therefore it was not necessary to explicitly mention it in the text on this right.

Concerning the explicit reference made to 'clean water' as part of article 28 on adequate living and social protection (which during the drafting process was for a while article 23), it should be first pointed out that these two rights were initially combined in the text of article 23, but then they were divided into two different paragraphs. During the third session, the Ad Hoc Committee stated that it wished to consider further the reference to 'clean water' in the right to adequate standard of living, since some members of the Working Group proposed its deletion on the grounds that it was not a right guaranteed under the ICESCR. However, other members considered that the reference was critical to the treatment and prevention of disabilities, and should be strengthened to include 'basic services'.[239]

By the sixth session of the Ad Hoc Committee reference to 'equal access to clean water' was still part of the right of persons with disabilities to an adequate standard of living. During the sixth session the Chairman of the Committee indicated that some delegations had suggested that the 'listing' of elements of an adequate standard of living (food, clothing, housing, access to clean water) was not necessarily helpful, and could thus be

[238] Special Rapporteur on the Right to Health, ' A Note on article 25 (health) submitted to the Ad Hoc Committee on A Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities', <http://www.un.org/esa/socdev/enable/rights/ahc7srhealth.htm> accessed 5 May 2013.

[239] Ad Hoc Committee on a Comprehensive and Integral Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 'Report of the Third session of the Ad Hoc Committee on a Comprehensive and Integral Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities', (9 June 2004) A/AC.265/2004/5, <http://www.un.org/esa/socdev/enable/rights/ahc3reporte.htm#footnote110> accessed 5 May 2013.

deleted. Other delegations, however, supported such a list, and in particular supported the reference to access to clean water.[240]

National Human Rights Institutions indicated that some delegates had voiced concerns about including an explicit reference to a right to clean water in article 28 on an adequate standard of living, and that these concerns seem to be based on the lack of such a reference in the text of the ICESCR. National Human Rights Institutions also indicated that such a reference is explicitly included in article 14 of the Convention on the Elimination of All Forms of Discriminations against Women, and that the CESCR has interpreted articles 11 and 12 of the ICESCR as including the human right to water, as mentioned in General Comment 15. Therefore, such a concern should be put to rest.[241]

The working text presented during the seventh session of the Ad Hoc Committee still included access to drinking water as one of the elements of the right to an adequate standard of living, which was by then already article 28.[242] However, the text of the drafting group, for the final session of the Ad Hoc Committee, deleted the phrase 'access to drinking water' that was included as part of the right to an adequate standard of living, and instead this reference appeared as part of the measures that are necessary to implement the right to social protection.[243] Since the working group, which drafted the last version of the text of the convention, held closed meetings, it is difficult to know with precision the grounds that motivated the working group to shift the reference to 'access to drinking water' from the right to adequate standard of living to the right to social protection.

The reasons for this decision are not clear from the *travaux préparatoires* of the Convention. This decision can be interpreted in two ways. The first is that access to drinking water is considered to be an inherent element of the right to an adequate standard of living and therefore its explicit reference is not necessary. This interpretation is supported by the suggestion, during the drafting process, that listing all the elements of an adequate standard of living was not necessarily helpful to define the

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[240] United Nations Enable 'Background documents, Article 28 adequate standard of living and social protection, Sixth Session Report by the Chairman', <http://www.un.org/esa/socdev/enable/rights/ahcstata28sevscomments.htm> accessed 7 May 2013.

[241] Ad Hoc Committee on a Comprehensive and Integral Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 'Background Documents: Comments, proposals and amendments submitted electronically, article 28 Adequate standard of Living and social protection, of the seventh session', <http://www.un.org/esa/socdev/enable/rights/ahcstata28sevscomments.htm> accessed 6 May 2013.

[242] --'Revision and Amendment at the seventh session of the Ad Hoc Committee, Working text International Convention on the Rights of Persons with Disabilities' <http://www.un.org/esa/socdev/enable/rights/ahc7ann2rep.htm> accessed 6 May 2013.

[243] See document of the drafting group, which are part of the Eight session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, <http://www.un.org/esa/socdev/enable/rights/ahc8.htm> accessed 8 May 2013.

right. The second interpretation is that an explicit reference to access to water was not made since certain states were concerned that the right to clean water was not explicitly recognised in other existing treaties, particularly in the ICESCR. However, this explicit reference is nevertheless still found in the following paragraph of the same article, recognising the existence of the right to water.

At the end, access to clean water is explicitly included in article 28, but as part of the right to social protection, which was previously known as social security. The latter was replaced by a broader phrase that encapsulates the assistance provided by the state, ensuring that there was no discrimination against persons with disabilities in the provision of that assistance.[244] In the future the Committee on the Rights of Persons with Disabilities, in charge of the implementation and interpretation of the Convention, could give a more comprehensive meaning to the term 'access to clean water' in article 28.

3.2.2.4. Reports, guidelines, and studies on the right to water within the UN bodies

In 1997, the Sub-Commission on Prevention of Discrimination and Protection of Minorities decided to entrust Mr El Hadji Guissé with the task of drafting a working paper on the promotion and the realisation of the right of everyone to access to drinking water supply and sanitation services.[245] This decision was made taking into account the Declaration on the Right to Development; the provisions of Chapter 18 of Agenda 21; the programme adopted by the UN Conference on Environment and Development on the protection of the quality and supply of freshwater resources; and the International Drinking Water Supply and Sanitation Decade.

The following year a report was presented by Mr El Hadji on the importance of water for human survival and the actual problems of having access to this resource. He indicated that lack or insufficiency of water was already causing some of the world's current conflicts. He concluded that given the magnitude, diversity and complexity of the problems related to access to drinking water and sanitation services, a descriptive study of these problems would go beyond the framework of the Sub-Commission's activities and might overlap with the work and studies of other UN bodies. However, he suggested that the Sub-Commission could undertake an in-depth study that would reveal

[244] See Background Documents on Article 28 on adequate standard of living and social protection, sixth session, Report by the Chairman, <http://www.un.org/esa/socdev/enable/rights/ahcstata28ssrepchair.htm> accessed 6 May 2013.
[245] UN High Commissioner for Human Rights, Sub-commission Resolution 1997/18 (25th meeting, 27 August 1997).

the relationship between the enjoyment of economic, social and cultural rights and access to drinking water and sanitation.[246]

Subsequently, the Sub-Commission on the Promotion and Protection of Human Rights recommended the Commission on Human rights to authorise the Sub-Commission to appoint Mr. El Hadji Guissé as Special Rapporteur to conduct a detailed study on the relationship between the enjoyment of economic, social and cultural rights, and the promotion of the right to drinking water supply and sanitation. Mr. El Hadji Guissé was instructed to conduct this study at both national and international levels, taking into account questions related to the realisation of the right to development, in order to determine the most effective means of reinforcing activities in this field.[247]

The Commission on Human Rights approved, through decision 2002/105 of 22 April 2002, the appointment of Mr. El Hadji Guissé as Special Rapporteur to conduct the proposed study.[248] Consequently, a preliminary report[249] was submitted explaining the different causes for drinking water shortage, which can be natural causes or causes linked to human activities. This report described the legal basis of the right to drinking water at the national and international level, and the content of the right. Regarding the latter, the report affirmed that *'[t]he right to drinking water means that all persons, without discrimination, must have access for their basic needs to a sufficient quantity and quality of water supplied under the best possible conditions*'.[250] It indicated that states must take all necessary measures to enable the poorest people to enjoy this right. It affirmed that the '*right to drinking water is an internationally recognized human right and is a right which in practice is related to all other human rights*' and illustrated the links between the right to water and other human rights.[251]

[246] ECOSOC, 'The right to access of everyone to drinking water supply and sanitation services, working paper by Mr. El Hadji Guissé, Special Rapporteur, under Sub-Commission resolution 1997/18', (10 June 1998) UN Doc E/CN.4/Sub.2/1998/7.
[247] UN High Commissioner for Human Rights, Sub-Commission on Human Rights resolution 2000/8 (25th meeting, 17 August 2000).
[248] UN Commission on Human Rights, Report on the Fifty-Eight Session (18 March- 26 April 2002), UN Doc. E/CN.4/2002/200, 393.
[249] ECOSOC, 'Relationship Between the Enjoyment of Economic, Social and Cultural Rights and the Promotion of the Realization of the Right to Drinking Water Supply and Sanitation, Preliminary Report Submitted by Mr. El Hadji Guissé in pursuance of Decision 2002/105 of the Commission on Human Rights and Resolution 2001/2 of the Sub-Commission on the Promotion and Protection of Human Rights', (25 June 2002) UN Doc E/CN.4/Sub.2/2002/10.
[250] ECOSOC, 'Relationship Between the Enjoyment of Economic, Social and Cultural Rights and the Promotion of the Realization of the Right to Drinking Water Supply and Sanitation, Preliminary Report Submitted by Mr. El Hadji Guissé in pursuance of Decision 2002/105 of the Commission on Human Rights and Resolution 2001/2 of the Sub-Commission on the Promotion and Protection of Human Rights', (25 June 2002) UN Doc E/CN.4/Sub.2/2002/10, para 33.
[251] ECOSOC, 'Relationship Between the Enjoyment of Economic, Social and Cultural Rights and the Promotion of the Realization of the Right to Drinking Water Supply and Sanitation, Preliminary Report Submitted by Mr. El Hadji Guissé in pursuance of Decision 2002/105 of the Commission on Human Rights and Resolution 2001/2 of the Sub-Commission on the Promotion and Protection of Human Rights', (25 June 2002) UN Doc E/CN.4/Sub.2/2002/10, para 36.

In 2005, the Special Rapporteur Mr El Hadji Guissé presented to the Sub-Commission on the Promotion and Protection of Human Rights a set of draft guidelines for the realisation of the right to drinking water supply and sanitation. The draft guidelines were intended to assist governments, policymakers, international agencies and members of civil society working in the water sector to implement the right to drinking water and sanitation. The draft guidelines highlight the main and most urgent components of the right to water and sanitation. They do not attempt to provide an exhaustive legal definition of the right to water and sanitation.[252] The draft guidelines are in line with General Comment 15 adopted in 2002 by the CESCR, and are a more detailed document to assist states in the realisation of the right to water. The draft guidelines deal with issues such as improving access to drinking water supply, affordability, water quality, participation and remedies, such as administrative or judicial procedures for complaints about violations of the right to water, and the obligation of states to refrain from actions that interfere with the enjoyment of this right in other countries.

Continuing this work, in September 2007, the High Commissioner for Human Rights presented a study to the Human Rights Council, as requested by decision 2/104 of 27 November 2006, on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments.[253] This study affirmed that the *'United Nations High Commissioner for Human Rights believes that it is now time to consider access to safe drinking water and sanitation as a human right, defined as the right to equal and non-discriminatory access to sufficient amount of safe drinking water for personal and domestic uses -drinking, personal sanitation, washing of clothes, food preparation and personal and household hygiene- to sustain life and health'.*[254]

Consequently, in March 2008, the Human Rights Council (hereinafter HRC) decided to appoint for a period of three years an Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation.[255] In September 2008, Ms Catarina de Albuquerque was appointed as Independent Expert,[256] who continued developing the respective studies on the human right to water. In March 2011, the HRC extended her mandate on water and sanitation, and made her Special Rapporteur on the human right to safe drinking water and sanitation, indicating that the right to water had

[252] UNCHR 'Realization of the right to drinking water and sanitation. Report of the Special Rapporteur, El Hadji Guissé' (11 July 2005) UN Doc. E/CN.4/Sub.2/2005/25.
[253] HRC 'Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments' (16 August 2007) UN Doc. A/HRC/6/3.
[254] UN HRC, Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments", (16 August 2007) UN Doc A/HRC/6/3, para 66.
[255] UN HRC Resolution 7/22 (2008) UN Doc. A/HRC/Res/7/22.
[256] United Nations Human Rights. 'Special Rapporteur on the Human right to safe drinking water and sanitation' <http://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/SRWaterIndex.aspx> accessed 15 March 2012.

been officially recognised by the UN bodies as a human right. This conclusion is supported by the tasks given in each mandate. Ms Albuquerque was asked as an Independent Expert to focus on preparing a compendium of best practices related to access to safe drinking water, to further study the content of the right to water, and to make recommendations that could help the realisation of the MDGs, in particular Goal 7.[257] In addition, as a Special Rapporteur she is expected to promote the full realisation of the human right to safe drinking water and sanitation by, inter alia, continuing to give particular emphasis to practical solutions with regard to its implementation and to work on identifying challenges and obstacles to the full realisation of the human right to water.[258] It can be seen that while the first tasks were related to the development of the right to water, such as working on its content, the additional tasks are related to the implementation or realisation of an established right.[259]

Over the course of her mandate, the Special Rapporteur has addressed a number of pressing issues regarding the implementation of the human right to water. Ms Albuquerque has reported on the compilation of good practices;[260] on the human rights obligations and responsibilities which apply in cases of non-state service provision of water and sanitation;[261] on the right to sanitation;[262] and on issues surrounding the resources available for the realisation of the right to water and sanitation.[263]

3.2.2.5. UN General Assembly Resolutions.

At this point it is clear that the recognition of the human right to water has been evolving for decades. To continue this process towards acknowledging the human right to water as an independent right, the UN General Assembly adopted, on 28 July 2010, a resolution that focuses on the recognition of the human right to water and sanitation.

[257] UN HRC Resolution 7/22 (2008) UN Doc. A/HRC/Res/7/22, para 2.
[258] UN HRC Resolution 16/2 (2011) UN Doc A/HRC/RES/16/2, para 5.
[259] Catarina de Albuquerque, *On the Right Track, Good Practices in Realising the Rights to Water and Sanitation* (Human Right to Water and Sanitation UN Special Rapporteur Lisbon 2012) 47 <http://www.ohchr.org/Documents/Issues/Water/BookonGoodPractices_en.pdf> accessed 12 July 2013.
[260] UN HRC, 'Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque", (1 July 2010) UN Doc. A/HRC/15/31/Add.1.
[261] UN HRC, 'Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque', (29 June 2010) UN Doc. A/HRC/15/31.
[262] UN HRC, 'Report of the Independent Expert on the Issue of Human Rights obligations Related to Access to Safe Drinking Water and Sanitation, Catarina de Albuquerque', (1 July 2009) UN Doc. A/HRC/12/24.
[263] UNGA, 'Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation', (3 August 2011) UN Doc. A/66/255.

The Resolution was submitted by Bolivia, and it was adopted with 122 votes in favour, none against and 41 abstentions.[264]

The Resolution 64/292 provides, the General Assembly:

> '*Recognizes the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights*'.[265]

Surprisingly, the countries that pushed for the recognition of this right and voted in favour for the Resolution are many of the poorest in the world, which are the ones having the greatest difficulty in guaranteeing access to water to their entire population.

During the introduction of the Resolution, Bolivia clearly affirmed that the proposal was intended to recognise the right to drinking water as an independent right. It affirmed that the '*right to drinking water and sanitation is a human right essential to the full enjoyment of life. Safe drinking water and sanitation are not only principal elements or components of other rights, such as the right to an adequate standard of living. The rights to safe drinking water and sanitation are independent rights which must be recognized as such*'.[266] Peru, Colombia and Chile, which voted in favour of the resolution, clarified that this right will be applied according to their national legislation and national relevant jurisprudence.[267] Colombia also noted that since the Resolution defines the right to water and sanitation as essential for the full enjoyment of life and all human rights, it interprets '*the General Assembly's intention to recognize the right to water and sanitation as a right derived from or viewed in connection with other rights, because the definition emphasizes its nature as an essential component in the enjoyment of the right to life and other rights'*.[268] Argentina, which also voted in favour, indicated that *'it is one of the main responsibilities of states to guarantee the right to water as a fundamental aspect of guaranteeing the right to life and ensuring an adequate standard of living'* and clarified that '*the right to water and sanitation is a human right that every State must ensure for the individuals within its jurisdiction and not with respect to other States*'.[269]

On the other hand, some of the countries that abstained expressed their concern about the recognition of this right mainly due to the lack of its content and therefore its

[264] The States that abstained were: Armenia, Australia, Austria, Bosnia and Herzegovina, Botswana, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Ethiopia, Greece, Guyana, Iceland, Ireland, Israel, Japan, Kazakhstan, Kenya, Latvia, Lesotho, Lithuania, Luxemburg, Malta, Netherlands, New Zealand, Poland, Republic of Korea, Republic of Moldova, Romania, Slovakia, Sweden, Trinidad and Tobago, Turkey, Ukraine, United Kingdom, United Republic of Tanzania, United States of America, and Zambia. UNGA '18th Plenary meeting' (28 July 2010) UN Doc. A/64/PV.108, p 9.
[265] UNGA Resolution 64/292 (2010) UN Doc A/Res/64/292, p 2.
[266] UNGA '18th Plenary meeting' (28 July 2010) UN Doc A/64/PV.108, p 5.
[267] UNGA '18th Plenary meeting' (28 July 2010) UN Doc A/64/PV.108, p 11, 13 and 15.
[268] UNGA '18th Plenary meeting' (28 July 2010) UN Doc A/64/PV.108, 13.
[269] UNGA '18th Plenary meeting' (28 July 2010) UN Doc A/64/PV.108, p 9.

unknown implications. For instance, the United States held that the Resolution describes a right to water and sanitation in a way that is not reflective of existing international law, as there is no right to water and sanitation in an international legal sense as described in the draft Resolution.[270] The United States also mentioned that the legal implications of declaring a right to water have not yet been carefully and fully considered by the General Assembly or by the HRC.[271] Canada also expressed its concern by stating that '*the current non-binding resolution would appear to declare that there is a right to safe and clean drinking water and sanitation as a human right, but does not set out the basis, scope or content of the right or the concomitant obligations of States with regard to this right*'.[272]

Subsequently, and following this development, in October 2010, the HRC affirmed for the first time, in Resolution 15/9, that '*the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity*'.[273]

According to Catarina de Albuquerque, the Special Rapporteur on the human right to safe drinking water and sanitation, the Resolution adopted by the HRC '*means that for the UN, the right to water and sanitation is contained in existing human rights treaties and is therefore legally binding*'.[274] It should be borne in mind that although resolutions adopted by the HRC are not, *per se*, legally binding[275], they may influence state

[270] It is probable that the United States made such a statement, since it has not ratified either of the universal conventions from which the right to water may derive or where access to water is explicitly mentioned. The United States is not a party to the International Covenant on Economic, Social and Cultural rights; the Convention on the Rights of the Child; the Convention on the Rights of Persons with Disabilities; or the Convention on the Elimination of All Forms of Discrimination against Women.
[271] UNGA '18th Plenary meeting' (28 July 2010) UN Doc A/64/PV.108, p 8.
[272] UNGA '18th Plenary meeting' (28 July 2010) UN Doc A/64/PV.108, p 17.
[273] UN HRC Resolution 15/9 (2010) UN Doc A/HRC/RES/15/9, para 3.
[274] UN News Centre 'Right to Water and Sanitation is Legally Binding, affirms Key UN Body' <http://www.un.org/apps/news/story.asp?NewsID=36308> accessed 10 December 2012.
[275] Under traditional international law secondary acts (acts adopted by international governmental organisation on the basis of primary law, i.e. its treaty of constitution) are not legally binding, but produce legal effects only in respect of member states of the relevant international governmental organisation. Alina Kaczorowska, *Public International Law* (4th edn Routledge, London 2010) 29, 64; According to Cassese Resolutions adopted by multilateral bodies are considered to be soft law. Antonio Cassese, *International law* (2nd edn OUP, Oxford 2005) 196; Boyle also states that "resolutions of international organizations and multilateral declarations by states may be soft in the sense that they are usually not legally binding in States, but this does not mean that they have no legal effect on customary law. Alan Boyle, 'Soft law in International Law-Making' in Malcolm D. Evans (ed), *International Law* (3rd edn OUP, Oxford 2010) 134; Freedman also indicates that the Human Rights Council has only non-binding powers. Nevertheless, non-binding acts seek to influence behaviour without creating law, but frequently forming the basis for soft law. Rosa Freedman, '*The United National Human Rights Council, A Critique and Early Assessment'* (Routledge, London 2013) 75.

practice.[276] She also mentioned that '*the right to water and sanitation is a human right, equal to all other human rights, which implies that it is justiciable and enforceable*'.[277]

The recognition made by the HRC is an attempt to resolve the debate over the absence of international legal treaties that expressly contain the right to water and sanitation. According to this Resolution, the right to water is derived from the right to an adequate standard of living and is inextricably linked to the rights to health, life and human dignity, confirming in this way the statement made by the CESCR in General Comment 15. In my opinion, the HRC is hereby strongly advising states that all treaties or covenants under the auspices of the UN that recognise the right to an adequate standard of living, the right to health, or the right to life and human dignity, should be read to incorporate the human right to water and sanitation, since the latter is derived from those rights.

There is no uniform agreement on the recognition of the right to water as an independent human right. This disagreement is due, inter alia, to the lack of its explicit reference in universal human rights conventions, and to the possible obligations that this right might generate between states, such as transfer of water resources. Nevertheless, the HRC is persuading states at least to recognise that the right to water is implicit in some of the existing rights embedded in human rights treaties.

3.2.3. Interaction between soft law and hard law instruments

Access to water to satisfy basic human needs has become a relevant issue examined internationally, both by government and legal experts since the 1960's. With the purpose of considering and analysing the interrelation between societal activities and the environment, a number of governmental conferences were held over the last four decades, where the importance of access to drinking water for human consumption was acknowledged. Given that there is a large number of people who still do not have access to this vital resource, it is important to recognise access to safe drinking water as a human right. This call was first clearly made in soft law instruments, such as the ones adopted in the UN Water Conference held in Mar del Plata in 1977, the Dublin Statement on Water and Sustainable Development of 1992, Agenda 21 of 1992, Ministerial declarations adopted at the first and second World Water Forum in 1997 and 2000 respectively, and the MDGs.

[276] Boyle also says that "soft law as part of the law-making process takes a number of different forms. While the legal effect of declarations resolutions, guidelines, and other soft law instruments is not necessarily the same, it is characteristic of nearly all of them that they are carefully negotiated, and often drafted statements, which are in some cases intended to have some normative significance despite their non-binding, non-treaty form". Alan Boyle, 'Soft law in International Law-Making' in Malcolm D. Evans (ed), *International Law* (3rd edn OUP, Oxford 2010) 124-125.

[277] UN News Centre 'Right to Water and Sanitation is Legally Binding, affirms Key UN Body' <http://www.un.org/apps/news/story.asp?NewsID=36308> accessed 10 December 2012.

The first explicit reference to access to water in an international convention was made in the Convention on the Elimination of All Forms of Discrimination against Women adopted in 1979. Then, a second explicit reference was incorporated in the Convention on the Rights of the Child adopted in 1989. However, the international treaties that explicitly refer to access to water have a limited scope in their *rationae personae.* Additionally, those Conventions embraced access to water as an essential element of other human rights. General Comment 15, adopted by the CESCR in 2002, recognises the human right to water for all, with no limitation in its scope of application, as a right that is implicit in the ICESCR. General Comment 15 provides the first authoritative definition of the right to water and identifies the obligations that state parties to the ICESCR need to undertake to implement this right. General Comment 15 strongly influences states to recognise the human right to water. Although General Comments are not legally binding, they have a considerable legal weight.[278] Furthermore, the UN General Assembly Resolution 64/292 (2010) and HRC Resolution 15/9 (2010) are part of a mobilisation effort to set a political and legal framework on the recognition of the right to water.[279]

Today, there are a number of hard law instruments, in addition to the international conventions on human rights, that acknowledge the importance of the right of access to drinking water for the satisfaction of basic needs. Among these instruments is: the UN Water Convention, which gives priority to the use of water to satisfy vital human needs over any other use.[280] Such a priority is also included in the Berlin Rules; the 1999 Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourse and International Lakes of 1992;[281] and some river basin agreements.[282] Likewise, states around the world are incorporating the human right to water as part of their domestic legal order.[283]

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[278] Matthew Craven, The International Covenant on Economic, Social and Cultural Rights, A Perspective on its Development (Clarendon Press, Oxford 1995) 91.
[279] Laurence Boisson de Chazournes, *Fresh Water in International Law* (OUP, Oxford 2013) 152.
[280] UN Watercourse Convention, Article 10.
[281] Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourse and International Lakes, Art. 6(1).
[282] Some of those agreements are the Charter of the Senegal River of 2002 (Article 4. Provides that the guiding principles of any distribution of water of the River aim at ensuring the populations of the Costal states, the full pleasure of the resource in the respect of the safety of the people and the works, as well as basic human rights to a salubrious water, from the point of view of a durable development); the Charter of the River Niger Basin and the Charter of Water of Lake Chad. Laurence Boissons de Chazournes, Fresh Water in International Law, (OUP, Oxford 2013) 151; Another binational agreement that gives priority to the vital human needs is the Agreement between Uruguay and Brazil concerning the basin Cuareim, Ajuste Complementario al Acuerdo de Cooperación entre el Gobierno de la Republica oriental de Uruguay y el Gobierno de la Republica federativa del Brasil para el Aprovechamiento de los Recursos Naturales y el Desarrollo de la Cuenca del Rio Cuareim (adopted in May 1997). Christina Leb (Cooperation in the Law of Transboundary Water Resources (CUP, Cambridge 2013) 208, see also <http://ocid.nacse.org/tfdd/tfdddocs/575SPA.pdf> accessed 2 December 2013.
[283] For a detail list of those states see section 3.4.

Looking back, it is now clear that soft law instruments have played an important role in the acknowledgment of the human right to water. Initially, soft law raised awareness about the problems of water scarcity and the essential function of water for every human being, thus persuading states to recognise water as a human right. Later, soft law established the content of the right to water, identified its main elements, and identified the obligations that it created. Finally, soft low has strongly influenced states to consider this right as incorporated into the international human rights system. There is no doubt that soft law has been the vehicle for mobilising a consistent, general response from states, which is now manifested in legally binding norms.

3.3. Implementation of the right to water in international human rights law

At the UN level there is a human rights treaty system mainly composed of nine core international conventions: the ICCPR; the ICESCR; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of Discrimination against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment; the Convention on the Rights of the Child; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; The International Convention for the Protection of All Persons from Enforced Disappearance; and the International Convention on the Rights of Persons with Disabilities.

This system aims at promoting and protecting human rights. With the purpose of achieving this goal, mechanisms for monitoring compliance of each one of the aforementioned conventions have been adopted. Thus, there are nine committees each one charged with monitoring the implementation of one particular convention. Committees carry out this function by examining reports submitted by state parties on the measures adopted for the implementation of the rights embedded in each of the Conventions, and by adopting recommendations for better implementation.

This section focuses on the monitoring mechanism of five different treaties from which the right to water is potentially derived. The purpose is to examine whether states have acknowledged in their implementation reports the right to water, and if so, whether states have recognised it as an independent or derivative right. Particularly the reports of Argentina, Bolivia, Chile and Colombia will be reviewed. Furthermore, complaint mechanisms where the committees review alleged violations of human rights due to lack of access to safe drinking water will also be examined.

3.3.1. Reporting under universal human rights conventions

Each one of the core universal human rights conventions has established a committee and a mechanism to monitor its implementation, through a reporting procedure. The monitoring procedures of the different UN human rights conventions share many similarities. According to these procedures, state parties to each convention have undertaken to submit periodic reports on the measures (including legislative, judicial or administrative) they have adopted to give effect to the rights recognised in the respective conventions, and on the progress made in the enjoyment of those rights.[284] Thus for each convention to which a state is a party a separate report must be provided. Each one of the committees has adopted guidelines on the form and content of the initial and periodic reports in order to assist states their reporting obligation. State reports must indicate the factors and difficulties, if any, affecting the implementation of the conventions.[285] The reports should deal specifically with the substantive rights of the Conventions article by article. When a state party has submitted a comprehensive initial report, it does not need to repeat information previously provided in its subsequent reports.[286] State reports other than the initial report should take into account the concluding observations of the respective committee regarding the previous reports, particularly concerns and recommendations.[287]

Reports are then examined by the respective committee to monitor the implementation of the convention, mostly through a dialogue between the committee and the representative(s) of the state party. The examination of the implementation of the core human rights conventions is done for all state parties, even if a state party fails to submit a report. In that event, the concerned state is reminded of its obligation to submit such a report. If the state continues to fail its obligation and does not submit the report, the committee will proceed to schedule a date to examine the implementation of the convention for that state. Normally the state party is invited to participate in such examination.[288] There is only one exception to this procedure: the CEDAW seems not

[284] ICCPR, Article 40; ICESCR, Article 16; Convention on the Elimination of All Forms of Discrimination agains Women, Article 18; Conventionon the Rights of the Child, Article 44; Convention on the Rights of Persons with Disabilities, Article 35.

[285] ICCPR, Article 40(2); ICESCR, Article 17(2); Convention on the Elimination of All Forms of Discrimination agains Women, Article 18(2); Conventionon the Rights of the Child, Article 44(2); Convention on the Rights of Persons with Disabilities, Article 35(5).

[286] ICESCR, Article 17(3); Convention on the Rights of the Child, Article 44(3); Convention on the Rights of Persons with Disabilities, Article 35.

[287] UN HRCom, 'Guidelines for the Treaty-Specific Document to be Submitted by States Parties under Article 40 of the International Covenant on Civil and political Rights', (4 October 2010), UN Doc. CCPR/C/2009/1, para B. UN Secretary-General, 'Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties on the International Human Rights Treaties', (30 June 2009) UN Doc. HRI/GEN/2/Rev.6, 28, 65, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/421/61/PDF/G0442161.pdf?OpenElement> accessed 20 September 2013.

[288] UN HRCom, 'Rules of Procedure of the Human Rights Committee' Rules 69-70 in 'Note by the Secretariat Compilation of Rules of Procedure Adopted by Human Rights Treaty Bodies', (28 May 2008), UN Doc HRI/GEN/3/Rev.3; UN CESCR, 'Rules of Procedure of the Committee on Economic, Social and

to examine the implementation of the Convention on the Elimination of All Forms of Discrimination against Women in the absence of a state report. The CEDAW has indicated that it may do so as a last recourse and under certain circumstances.[289]

Following the examination of the reports, the committee adopts concluding observations to assist state parties in implementing their obligations under the conventions. The concluding observations are structured as follows: an introduction, often with remarks on whether or not the report was submitted on time and according to the reporting guidelines; then positive aspects highlighting key achievements; and then the main section, listing concerns and recommendations.[290] The Committees also submit annual reports to the UN General Assembly where the adopted concluding observations are included.

The vast number of reports that each committee must examine, given the large number of state parties to each convention, has created a backlog of unprocessed reports. The variousreporting procedures and reporting guidelines have also put a heavy burden on those states that have ratified many or even all of the core conventions. These circumstances are challenging the human rights treaty system by creating delays in submission and consideration of reports, non-reporting and duplicative reporting requirements among treaty bodies. Therefore, the UN Secretary-General has worked to harmonise the reporting guidelines under the international human rights conventions. As a result each report now consists of two parts. The first part is a common core document, to be submitted to all committees, containing information of relevance to multiple treaties, including, general information on the state; demographic, economic, social and cultural characteristics of the state; constitutional political and legislative structure of the state; and legal framework for the promotion and protection of human rights. A second part is a treaty-specific document, which should contain all information concerning the implementation of each specific convention.[291]

Cultural Rights, Rule 59 in 'Note by the Secretariat Compilation of Rules of Procedure Adopted by Human Rights Treaty Bodies', (28 May 2008), UN Doc. HRI/GEN/3/Rev.3; ECOSOC, 'Report on the Forty-Sixth and Forty-Seventh Sessions' E/2012/22, para 47-48; UN Committee on the Rights of Child, 'Provisional Rules of Procedure of the Committee on the Rights of the Child' Rule 67 in 'Note by the Secretariat Compilation of Rules of Procedure Adopted by Human Rights Treaty Bodies', (28 May 2008), UN Doc. HRI/GEN/3/Rev.3; UN Committee on the Rights of the Child, 'Overview of the Reporting procedures', (24 October 1994), UN Doc. CRC/C/33, para 29-32; UN Committee on the Rights of Persons with Disabilities, 'Rules of Procedure of the Committee on the Rights of Persons with Disabilities, (13 August 2010), UN Doc. CRPD/C/4/2, Rule 40.

[289] UN Committee on the Elimination of Discrimination against Women, 'Overview of the Working Methods of the Committee on the Elimination of Discrimination against Women in Relation to the Reporting Process', (4 June 2009), UN Doc. CEDAW/C/2009/II/4 Annex III, para 15.

[290] Water Kälin, 'Examination of States Report' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies, Law and Legitimacy* (CUP, Cambridge 2012) 26.

[291] UN Secretary-General, 'Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties on the International Human Rights Treaties', (30 June 2009) UN Doc. HRI/GEN/2/Rev.6 <http://daccess-dds-

3.3.1.1. Reporting under the International Covenant on Civil and Political Rights

3.3.1.1.1. Functioning

The ICCPR entered into forced on 23 March 1976. Currently, 167 states are parties to this Convention. The ICCPR established the HRCom, which is composed of eighteen members of nationals of the state parties to the Convention, who must be of high moral character and recognised competence in the field of human rights.[292]

State parties to the ICCPR must submit reports regarding the implementation of the Convention within one year after the entry into force of the ICCPR for the state party concerned and thereafter whenever the HRCom so requests.[293] The HRCom has adopted a practice of stating at the end of its concluding observation a date by which the following periodic report should be submitted.[294] The HRCom shall transmit its reports and such general comments as it may consider appropriate to state parties. The state parties may also submit observations on any comment that the HRCom has made.[295]

The HRCom shall notify the state parties of the date, duration and place of the session at which their respective reports will be examined. Representatives of the states may be present at the meeting when their reports are examined. The HRCom may also inform a state party from which it decides to seek further information that it may authorise its representative to be present at a specified meeting. Such a representative should be able to answer questions made by the HRCom and make statements on reports previously submitted by the state party concerned, and may also submit additional information from that state party.[296] After public discussion on the state report, the HRCom meets in closed session to discuss the concluding observations, which are adopted by consensus.[297]

3.3.1.1.2. Practice

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ny.un.org/doc/UNDOC/GEN/G04/421/61/PDF/G0442161.pdf?OpenElement> accessed 20 September 2013.

[292] ICCPR, Article 28.

[293] ICCPR, Article 40(1).

[294] UN HRCom, 'Guidelines for the Treaty-Specific Document to be Submitted by States Parties under Article 40 of the International Covenant on Civil and political Rights', (4 October 2010) UN Doc. CCPR/C/2009/1, para 12.

[295] ICCPR, Article 40 (4)(5).

[296] UN HRCom, Rules of Procedure of the Human Rights Committee, (11 January 2012) UN Doc. CCPR/C/3/Rev.10, Rule 68.

[297] Water Kälin, 'Examination of States Report' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies, Law and Legitimacy* (CUP, Cambridge 2012) 26.

States should follow the reporting guidelines of the HRCom when preparing their reports. The latest version of the guidelines was adopted in July 2010.[298] None of the reporting guidelines adopted by the HRCom require information on access to water as a measure to implement any of the rights embedded in the ICCPR. Nevertheless, some state reports mention that access to drinking water was a measure adopted to implement certain civil and political rights. This can be interpreted as an indication that states are becoming aware that access to drinking water can contribute to the realisation of certain civil and political rights.

For instance, in its 2007 report on the implementation of the right to life (article 6)[299], Ecuador affirmed that its Constitution prohibits the suspension, for any reason, of public services, including, education, justice, electricity and drinking water. Ecuador explicitly noted that the aim of this norm is to safeguard the right to life.[300] In other words, Ecuador acknowledges that the suspension of essential public services might put individual lives in danger.

Similarly, regarding the implementation of article 10[301] on the rights of all persons deprived of their liberty, New Zealand affirmed in its 2007 report that, responding to complaints about the transportation of prisoners, it has taken steps to ensure that prisoners have sufficient water during journeys. Therefore, the Department of Correction is implementing national standards for the supply of food and water to prisoners in transport.[302] As a result, New Zealand now considers guaranteed access to drinking water for prisoners, at any time, even during transportation, an important element to implementation of article 10 of the ICCPR.

Another country that has acknowledged the importance of access to drinking water is Belgium. In its 2009 report on the implementation of article 9[303], lawfulness of arrest

[298] UN HRCom, 'Guidelines for the Treaty-Specific Document to be Submitted by States Parties under Article 40 of the International Covenant on Civil and Political Rights', (4 October 2010) UN Doc. CCPR/C/2009/1.

[299] ICCPR, Article 6 "1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".

[300] UN HRCom, 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Fifth Periodic Report, Ecuador', (22 December 2007), UN Doc. CCPR/C/ECU/5, para 114.

[301] ICCPR, Article 10 "1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human persons.
2 (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons; (b) Accused juveniles persons shall be separated from adults and brought as speedily as possible for adjudication.
3. The penitentiary system shall comprise treatment of prisoners the essential aims of which be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status".

[302] UN HRCom, 'Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Fifth Periodic Reports of States Parties, New Zealand', (24 December 2007), UN Doc. CCPR/C/NZL/5, para 230

[303] ICCPR, Article 9 "1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

and detention, Belgium affirmed that it had made improvements since its previous reports. Accordingly, the Police Functions Act, relating to certain rights to persons deprived of liberty and to basic safeguards against mistreatment, was amended to include, inter alia, the right to receive an adequate supply of drinking water for individuals under administrative and judicial arrest. Under this law, the person arrested should also be informed of this right.[304] Based on this legislation, it is evident that for Belgium drinking water is an essential element to implementation of the rights of persons deprived of their liberty.

The state reports of the four countries that are the focus of this study are analysed below.

- Argentina

There is no reference to access to water in the reports submitted by Argentina concerning the measures taken to implement the rights enshrined in the ICCPR, nor had the HRCom noted anything in relation to this topic.

- Bolivia

In a report submitted in 1996 under article 7[305] of the ICCPR on the prohibition of torture and other cruel, inhuman or degrading punishment or treatment, Bolivia indicated that such a conduct is categorically prohibited in its national Constitution. Nevertheless, there are still cases of torture occurring in Bolivia, particularly during investigations of crimes by the police. Since the Government is working on the eradication of the violation of this right, it is investigating cases of torture by the police with a view to prosecute the perpetrators. A report was published about torture inflicted on citizens accused of terrorism. In this report, deprivation of food and water are described as torture and ill-treatment.[306]

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2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation".

[304] UN HRCom, 'Consideration of Reports Submitted by States Parties under Article 40 of the Convention, fifth periodic report, Belgium', (28 January 2009), UN Doc. CCPR/C/BEL/5, 40-41.

[305] ICCPR, Article 7 "No one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation".

[306] UN HRCom, 'Consideration of Reports submitted by State Parties under Article 40 of the Covenant, Second Periodic Reports of States Parties due in 1990, Addendum, Bolivia', (20 March 1996) UNDoc. CCPR/C/63/Add.4, paras 40-43.

- Chile

In its 2006 periodic report, Chile makes a clear link between progress in the implementation of rights protected under the ICCPR and access to safe water. The report mentioned a particular case in which a judicial remedy was imposed for violation of the right to life due to contaminated drinking water. The Appellate Court of Antofagasta ordered that an arsenic abatement plant owned by one of the municipalities of Antofagasta must be brought into operation to eliminate excess arsenic in the drinking water, as the inhabitants are at great risk from consuming water with a high arsenic content.[307] According to this report, Chile considers that the right to life was at stake due to the consumption of unsafe water. Accordingly, to protect the right to life of the inhabitants of that municipality it was necessary to provide them with clean and safe drinking water.

Furthermore, this report also indicates that an increase in drinking water coverage and a reduction in water pollution are measures that Chile adopted to improve conditions conducive to the enjoyment of the right to life. Chile declared that drinking water coverage for the urban population has increased, reaching 99.3 percent in all urban centres in the country by the end of the 1990's. In addition, the gradual construction of wastewater treatment plants make it possible to recycle a large proportion of the country's freshwater resources, particularly since liquid household waste is the main source of water pollution in Chile.[308] It can be inferred from this report that for Chile there is a clear connection between access to safe drinking water and the enjoyment of the right to life.

- Colombia

In the reports submitted by Colombia, there is only one reference to access to water, in the 2010 report on the administrative measures adopted to protect the rights of the child (article 24)[309]. The report noted that in 2004 a proposal for a process of monitoring the living conditions and quality of life of children and adolescents in the different departments and municipalities of Colombia was drafted. Then in 2005, this proposal was linked to a national process entitled 'Municipalities and Departments' Strategy for

[307] UN HRCom, 'Considerations of Reports Submitted by States Parties under Article 40 of the Covenant, Fifth periodic report, Chile', (7 February 2006) UN Doc. CCPR/C/CHL/5, para 56(a).
[308] UN HRCom, 'Considerations of Reports Submitted by States Parties under Article 40 of the Covenant, Fifth periodic report, Chile', (7 February 2006), UN Doc. CCPR/C/CHL/5, paras 122-123.
[309] ICCPR, Article 24 "1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.

Children and Adolescents', where eight priority areas were identified, including drinking water and basic sanitation.[310]

Likewise, a previous report submitted in 1996 indicated that increasing access to safe water and health services have resulted in a substantial drop in infant mortality.[311] Although, this statement is included in the report as part of the demographic characteristics of Colombia, and not in relation to the implementation of any human right in particular, it is significant that Colombia is recognising that increasing access to safe water reduces infant mortality, thereby contributing to the implementation of the right of children (article 24) [312] and concomitantly the right to life (article 6).

These state reports demonstrate that states have started to recognise access to drinking water as an important element for the implementation of certain civil and political rights, mainly because the deprivation of safe drinking water may lead to the violation of such rights, including the right to life (article 6), the prohibition of torture or ill-treatment (article 7), and the rights of the child (article 24) embedded in the ICCPR.

- Annual reports of the Human Rights Committee

As part of the reporting procedure, the HRCom also has the obligation to submit annual reports to the UN General Assembly. These reports include references to lack of access to drinking water as signifying the failure to implement the substantive rights of the ICCPR. The HRCom expressed its concern regarding the implementation of article 10 of the ICCPR because of poor sanitary conditions in Bulgarian detention facilities, including lack of access to drinking water, and regular water and electricity cuts.[313] Thus, the HRCom recommended in 2011 that Bulgaria should fully implement the Standard Minimum Rules for the Treatment of Prisoners[314] for a better implementation of the right to dignity of persons deprived of their liberty. Likewise, regarding the implementation of article 10 of the ICCPR, the HRCom has expressed its concern regarding the high levels of overcrowding and poor conditions, especially lack of

[310] UN HRCom, 'Consideration of Reports submitted by States Parties Under Article 40 of the Covenant, Sixth Periodic report, Colombia', (10 December 2010), UN Doc. CCPR/C/COL/6, para 539.
[311] Report submitted by Colombia 'Basic Document Forming an Integral Part of the Reports of States Parties, Colombia', (4 November 1996), UN Doc. HIR/CORE/1/add.56/Rev.1, para 11.
[312] ICCPR, Article 24 "1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measure of protection as are required by his status as minor, on the part of his family, society and the state".
[313] ICCPR, Article 10 "1. All persons deprived of their liberty shall be treated with humanity and with respect for their inherent dignity of the human person.
2 (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons; (b) Accused juveniles persons shall be separated from adults and brought as speedily as possible for adjudication.
3. The penitentiary system shall comprise treatment of prisoners the essential aims of which be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status".
[314] Report of the Human Rights Committee Volume I, 100th, 101th and 102th Sessions, (11 October 2010-29 July 2011), UN Doc. A/66/40 (vol. I) 76.

hygiene and the shortage of drinking water, prevailing at detention centres in Honduras (2006), Nicaragua (2008), Panama (2008) and Ecuador (2009). Consequently, the HRCom made a similar recommendation to these countries, to increase their efforts to improve conditions for all persons deprived of their liberty, particularly complying with all requirements of the Standard Minimum Rules for the Treatment of Prisoners[315], which establishes, inter alia, that prisoners shall be provided with water.[316]

In the annual report of 2010, the HRCom expressed its concern about how water shortages were disproportionally affecting the Palestinian population of the West Bank, mainly since they were prevented by Israel from constructing and maintaining water and sanitation infrastructure, such as the construction of wells. Also the HRCom stated its concern about the allegations of pollution by sewage water of Palestinian land, including from settlements; these conditions affect the implementation of article 6 (right to life) and article 26 (equality before the law and non-discrimination)[317] of the ICCPR. Consequently, the HRCom recommended that Israel ensure that all residents of the West Bank have equal access to water, which should be in accordance with the quality and quantity standards of the WHO. The HRCom also recommended that Israel should allow the construction of water and sanitation infrastructure, including wells, for the Palestinian population.[318] This report indicates that the HRCom considers access to adequate quantities of safe drinking water to be an important element of effective implementation of the right to life under article 6 of the ICCPR. Lack of access to water for the Palestinian population located in the West Bank amounts to a violation of article 26 of the ICCPR by the Israeli government.

The HRCom also expressed its concern about the allegation of the release of mercury in the environment, caused by mining concessions in Suriname (2004), that affected the environment of the area and in particular the Maroon and Amerindian Communities. The HRCom stated that this circumstance threatens the life, health and environment of indigenous communities. Therefore, it recommended that Suriname guarantee to the

[315] Report of the Human Rights Committee volume I, 94th, 95th and 96th sessions, (13 October 2008- 31 July 2009), UN Doc. A/64/40 (Vol. I) 38; Report of the Human Rights Committee volume I, 97th, 98th and 99th sessions, (12 October 2009-30 July 2010), UN Doc. A/65/40 (Vol. I) 47; Report of the Human Rights Committee volume I, 91th, 92th and 93th sessions, (15 October 2007- 25 July 2008), UN Doc. A/63/40 (Vol. I) 57; Report of the Human Rights Committee volume I, 88th, 89th and 90th sessions, (16 October 2006-27 July 2007), UN Doc. A/62/40 (Vol. I) 22

[316] United Nations Standard Minimum Rules for the Treatment of Prisoners (adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1995, and approved by the ECOSOC Resolutions 663 C (XXIV) of 31 July 1967 and 2076 (LXII) of 13 May 1977), Basic principle 15 "Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilets articles as are necessary for health and cleanliness". Basic principle 20 (2) "Drinking water shall be available to every prisoner whenever he needs it".

[317] ICCPR, Article 26 "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

[318] Report of the Human Rights Committee volume I, 97th, 98th and 99th sessions, (October 2009 –July 2010), UN Doc. A/65/40 (Vol. I) 82.

members of the indigenous communities the full enjoyment of all the rights recognised by article 27[319] of the ICCPR and to adopt specific legislation for this purpose. The state should take the necessary steps to prevent mercury poisoning of water, and thereby of its inhabitants, in the territory of the state.[320] Thus, the HRCom also recognises the importance of guaranteeing access to adequate quantities of safe drinking water to all, without discrimination, to achieve the implementation of certain human rights embedded in the ICCPR.

These annual reports lead to the conclusion that the HRCom acknowledges that lack of access to safe drinking water may constitute a violation of certain human rights enshrined in the ICCPR. These rights are embedded in article 6 (right to life), article 10 (right of the persons deprived of their liberty to be treated with humanity and respect), articles 26 (equality before the law) and article 27 (the rights of minorities). Therefore, to avoid violations of these provisions it is important that states guarantee access to drinking water of good quality and in the necessary quantities, without discrimination.

3.3.1.2. Reporting under the International Covenant on Economic, Social and Cultural Rights

3.3.1.2.1. Functioning

The ICESCR entered into force on 3 January 1976, and currently 160 states are party to this Convention. Monitoring the implementation of the ICESCR is conducted by the CESCR, which was established by the Economic and Social Council (hereinafter ECOSOC) through Resolution 1985/17 of 28 May 1985. Therefore, the Committee is not a body established by the treaty but a subsidiary body of the ECOSOC.[321]

States must report on the implementation of the ICESCR initially within two years of accepting the ICESCR and thereafter every five years.[322] The CESCR must submit to the ECOSOC a report on its activities, including a summary of its consideration on the reports submitted by state parties to the ICESCR. It must also make suggestions and recommendations of a general nature based on those reports and the reports submitted by the specialised agencies. The recommendations are to assist the ECOSOC in fulfilling, in particular, its responsibilities under articles 21 and 22 of the ICESCR to

[319] ICCPR, Article 27 "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language".
[320] Report of the Human Rights Committee volume I, 79th, 80th and 81th sessions, (October 2003 –July 2004), UN Doc. A/59/40 (Vol. I) 47.
[321] Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International law* (Hart Publishing, Oxford 2009) 28.
[322] UN CESCR, Rules of Procedure of the Committee (adopted by the Committee at its third session in 1989), Rule 58 (2). UN Doc E/C.12/1990/4/Rev.1. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G93/183/98/PDF/G9318398.pdf?OpenElement> accessed 15 May 2013.

report to the General Assembly with recommendations of a general nature and with a summary of the information received from state parties.[323]

The state reports should be made in accordance with the reporting guidelines prepared by the CESCR.[324] The reporting guidelines adopted in 1991, known as the revised reporting guidelines, asked state parties to include in their reports certain indicators regarding access to water in relation to two particular rights: the right to adequate housing, which is included in the right to an adequate standard of living; and the right to health, embraced in articles 11 and 12 of the ICESCR, respectively. Concerning, the right to adequate housing (article 11), the reporting guidelines required information about the number of individuals and families inadequately housed and without ready access to basic amenities such as water. Regarding the right to health (article 12), the guidelines required states to provide information about population access to safe water, disaggregated in urban and rural populations.[325] The reporting guidelines of 1991 showed that the CESCR recognised a connection between access to water and the rights to health and the right to adequate housing. The revised reporting guidelines were also in conformity with General Comment 4, which indicated that adequate housing should have access to safe drinking water.

In 2008 the CESCR adopted new reporting guidelines[326], taking into account the harmonised rules on reporting, as well as the evolving practice under the ICESCR. The new guidelines replaced the revised guidelines of 1991. The new guidelines still request states to provide information about access to water in relation to the right to housing and the right to health. Furthermore, in relation to article 11 (the right to an adequate standard of living) states are now required to provide information on the right to water as an independent right. In other words, the CESCR gives a new structure to the form and content of state reports on the implementation of article 11 ICESCR. According to the new structure, state reports should provide information on the right to an adequate standard of living based on the following elements: the right to the continuous improvement of living conditions; the right to adequate food; the right to water; and the right to adequate housing. This development is consistent with General Comment 15, where the right to water is considered as a separate right that emanates from and is indispensable for the realisation of the right to an adequate standard of living. These

[323] ECOSOC Resolution 1985/17 (adopted 28 May 1985 on the 22nd plenary meeting).
[324] The last reporting guidelines were adopted on 24 March 2009 by the Committee on Economic, Social and Cultural Rights (UN Doc E/C.12/2008/2), replacing the revised general guidelines (UN Doc E/C.12/1991/1).
[325] UN CESCR, 'Revised General Guidelines Regarding the Form and Contents of Reports to be Submitted by States Parties under Article 16 and 17 of the International Covenant on Economic, Social and Cultural Rights', (17 June 1991), UN Doc E/C.12/1991/1.
[326] UN CESCR 'Annex Guidelines on Treaty-Specific Documents to be Submitted by States Parties Under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights' in 'Note by the Secretary-General, Guidelines on Treaty-Specific Documents to be Submitted by States Parties Under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights' (24 March 2009) UN Doc. E/C.12/2008/2.

new guidelines confirm the progress on the recognition of the right to water as an independent right.

As a result, the new reporting guidelines require states to provide more detailed information on access to water with the purpose of determining whether or not states are implementing this right. The information that should be indicated in the reports relates to: a) the measures taken to ensure adequate and affordable access to water that is sufficient for personal and domestic uses for everyone; b) the percentage of households without access to sufficient and safe water in the dwelling or within its immediate vicinity, disaggregated by region and by urban and rural populations, and the measures taken to improve the situation; and c) the system in place to monitor the quality of water.[327] The required information is in line with the measures indicated in General Comment 15 to implement the right to water.

3.3.1.2.2. Practice

Because the revised guidelines require state parties to submit information on access to water in connection with the right to adequate housing and the right to health, data on this issue is found in different state reports. For instance, the implementation measures adopted by Georgia are discussed in the state report (2001) on the provision of amenities in housing stock, as part of the right to adequate housing.[328] Regarding article 12 on the right to health, access to drinking water is examined as one of its elements. Georgia mentioned in its report that the main problems with the supply of clean drinking water are human induced pollution, the shortage of drinking water and poorly maintained infrastructure. Georgia reported that although 70 percent of its population has access to piped drinking water (95 percent in urban area and 35 percent in rural area), the water supplied to most of the population does not meet current health and hygiene standards. Georgia mentioned that in 1999 the centralised water distribution system in a number of towns and districts was subject to chemical and bacteriological tests and a significant number of samples failed to meet existing standards.[329] Thus, the health of the Georgian population may be affected by the supply of unsafe water, which does not meet the minimum health standard.

Some state reports refer to access to drinking water as part of the implementation measures adopted to guarantee the realisation of other human rights. For instance, the

[327] UN CESCR, 'Guidelines on Treaty-specific Documents to be Submitted by States Parties under Article 16 and 17 of the International Covenant on Economic, Social and Cultural Rights', (24 March 2009) UN Doc E/C.12/2008/2, 11.
[328] ECOSOC, 'Implementation of the International Covenant on Economic, Social and Cultural Rights, Second Periodic Report Submitted by States Parties under Article 16 and 17 of the Covenant, Georgia', (19 June 2001), UN Doc. E/1990/6/Add.31, para 171-172.
[329] ECOSOC, 'Implementation of the International Covenant on Economic, Social and Cultural Rights, Second Periodic Report Submitted by States Parties under Article 16 and 17 of the Covenant, Georgia', (19 June 2001), UN Doc. E/1990/6/Add.31, para 192-195.

initial report of the Solomon Islands concerning the implementation of article 7 on the right to favourable conditions into the workplace, submitted in 2001, indicates that the law in this country requires the employer to provide water, housing and medical care and treatment for its workers. Where no public water supply is readily available, the employer, at its own expenses, must provide water for drinking purpose, washing and other domestic purposes to workers and their dependants living on the employer's property.[330] Therefore, for the Solomon Islands access to water for personal and domestic uses is also considered part of the favourable conditions that should be guaranteed to workers living on the property of the employer. Furthermore, this report provides information on access to water in relation to articles 11 and 12 as requested by the revised reporting guidelines.[331]

Some of the state reports submitted after 2009 comply with the new reporting guidelines. For instance, Belgium submitted its last report in 2010. Reporting on the measures adopted for the implementation of article 11, Belgium uses exactly the same structure indicated in the new reporting guidelines. The information provided in the report concerning article 11 is divided as follows: the right to continuous improvement of living conditions, the right to food, the right to water and the right to adequate housing. As part of the information on the right to water, Belgium mentions that different initiatives have been taken to help people living in poverty to pay their water bills.[332] Finland is another country that is following the new guidelines under article 11, as shown by its last report submitted in 2011.[333] Likewise, Canada in its report of 2009 is following the new guidelines, although due to its organisation, it analyses every right according to its provincial divisions. Additionally, Canada incorporated into its last report a letter to the Secretary General of the UN Conference on Sustainable Development, in which it expresses its position regarding the right to water. Canada explicitly affirms that:

> *'Canada recognizes the human right of everyone to safe drinking water and basic sanitation as essential to the right to an adequate standard of living, and therefore, implicit under article 11 of the International Covenant on Economic, Social and Cultural rights. Canada interprets the right to safe drinking water and basic sanitation as the right to a sufficient quantity and*

[330] ECOSOC, 'Implementation of the International Covenant on Economic, Social and Cultural Rights, Initial Reports Submitted by States Parties under Article 16 and 17 of the Covenant, Solomon Islands', (2 July 2001), UN Doc. E/1990/5/Add.50, para 84.
[331] ECOSOC, 'Implementation of the International Covenant on Economic, Social and Cultural Rights, Initial Reports Submitted by States Parties under Article 16 and 17 of the Covenant, Solomon Islands', (2 July 2001), UN Doc. E/1990/5/Add.50, paras187-192, and 207(h).
[332] ECOSOC, 'Implementation of the International Covenant on Economic, Social and Cultural Rights, Fourth Periodic Reports Submitted by States Parties under Article 16 and 17 of the Covenant, Belgium, (9 July 2010), UN Doc. E/C.12/BEL/4, 49-51.
[333] UN CESCR, 'Implementation of the International Covenant on Economic, Social and Cultural Rights, Consideration of the sixth periodic report of States Parties due in 2010 under Article 16 and 17 of the Covenant, Finland', (15 July 2011), UN Doc. E/C.12/FIN/6, 31-33.

safe quality of reasonably affordable and accessible water for personal and domestic uses (i.e., for drinking, cooking and for personal and household hygiene), and to basic sanitation that is safe and hygienic. Water and sanitation services should be physically and economically accessible on an equal and non-discriminatory basis.

Canada further recognizes that the right to safe drinking water and basic sanitation does not encompass transboundary water issues, including bulk water trade, nor any mandatory allocation of international development assistance'.[334]

However, not all state reports fully follow the form and content indicated in the new reporting guidelines. While some states do not provide information about certain implementation measures at all, others use a different structure. For example, Indonesia in its initial report, submitted in 2012, uses a different structure, where the right to water and sanitation, the right to adequate housing and the right to food are examined as independent rights, with no indication whatsoever that these rights are part of the right to an adequate standard of living.[335]

It should be noted that it is not possible to know yet if all state parties will follow the form and content of the new reporting guidelines, since many states submitted their report before the adoption of the new guidelines. Although some states are not reporting on their implementation of the right to water as requested by the CESCR, that does not mean that those states do not recognise the right to water. And some state reports refer to access to safe water as a mechanism to implement rights other than the ones embedded in articles 11 (adequate living conditions) and 12 (right to health), from which the CESCR is not requesting such information. This reporting could be interpreted as an indication of the relevance that access to water has in the implementation of those human rights for those states. A clear example is the right to favourable conditions in the workplace (article 7), as discussed in the report of the Solomon Islands, which affirmed that employers are obliged by law to provide drinking water for personal and domestic purposes to the employees living on the property of the employer. Similarly, Brazil considers that access to water is an essential element of the right to food and nutritional security; therefore, it has constructed cisterns in semiarid areas to provide farmers with water for domestic consumption.[336] With this mechanism

[334] Government of Canada, "International Covenant on Economic, Social and Cultural Rights, Sixth Report of Canada covering the period January 2005 -December 2009", Appendix 2, <http://www2.ohchr.org/english/bodies/cescr/future.htm> accessed 23 May 2013.
[335] UN CESCR 'Implementation of the International Covenant on Economic, Social and Cultural Right, Initial Report Submitted by States Parties under Articles 16 and 17 of the Covenant, Indonesia', (23 January 2012), UN Doc. E/C.12/IND/1, para 172.
[336] ECOSOC, 'Implementation of the International Covenant on Economic, Social and Cultural Rights, Second Periodic Reports Submitted by States Parties in Accordance with Article 16 and 17 of the Covenant, Brazil', (6 August 2007), UN Doc. E/C.12/BRA/2, para 339.

people have benefited from access to good quality water in their homes, contributing to the realisation of different human rights.

Concerning the four states that are the focus of our study, it can be said that:

- Argentina

In the second report presented by Argentina (1997), data were included on access to an adequate water supply as part of the implementation of article 12 (right to health). In particular, the report discusses the improvements in environmental and industrial hygiene, and in the prevention, treatment and control of diseases.[337] However, access to water was not mentioned in any regard as part of the right to an adequate standard of living.

In the last report which was submitted in May 2009, access to drinking water is discussed in relation to the rights to food and housing, as part of the right to an adequate standard of living, but not as a separate right, as the new reporting guidelines are requesting.[338] Nevertheless, it seems that the report was prepared and submitted just before the publication of the new guidelines.

- Bolivia

So far, the reports of Bolivia have been submitted before the adoption of the new reporting guidelines; therefore, it is not possible to determine whether Bolivia is following the new guidelines on how the right to adequate standard of living should be reported. The initial (1999) and second report (2007) of Bolivia provided information regarding access to water in relation to articles 11 and 12 of the ICESCR.[339] Bolivia affirmed that the vast majority of the population of the country lives in houses that do not meet the minimum standards of habitability. Poor-quality construction, high rates of overcrowding and lack of basic amenities are the main problems. One quarter of all homes combine all the problems of habitability, lacking basic amenities such as access to water, sewerage and electricity.[340] The initial report declared that by 1992, 58 percent

[337] ECOSOC, 'Implementation of the International Covenant on Economic, Social and Cultural Rights, Second Periodic Reports Submitted by States Parties in Accordance with Article 16 and 17 of the Covenant, Argentina', (23 May 1997), UN Doc. E/1990/6/Add.16, para 212.
[338] ECOSOC, 'Implementation of the International Covenant on Economic, Social and Cultural Rights, Third Periodic Reports Submitte by States Parties under Articles 16 and 17 of the Covenant, Argentina', , (6 May 2009), UN Doc. E.C.12/ARG/3paras 491, 507, 536, 589, 608, 620, 625, 628.
[339] ECOSOC, 'Implementation of the International Covenant on Economic, Social and Cultural Rights, Initial Reports Submitted by States Parties in Accordance with Article 16 and 17 of the Covenant, Bolivia', (14 July 1999) UN Doc. E/1990/5/Add.44; ECOSOC, 'Implementation of the International Covenant on Economic, Social and Cultural Rights, Second Periodic Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Addendum, Bolivia', (30 January 2007), UN Doc. E/C.12/BOL/2.
[340] ECOSOC, 'Implementation of the International Covenant on Economic, Social and Cultural Rights, Initial Reports Submitted by States Parties in Accordance with Article 16 and 17 of the Covenant, Bolivia', (14 July 1999), UN Doc. E/1990/5/Add.44, paras 339-341.

of the total population had access to drinking water. Therefore, some programmes were implemented to improve and expand access to drinking water in rural and urban areas, with priority to the former sector of the population.[341] The second report provides information regarding the percentage of the population with access to water, as part of the right to an adequate standard of living. The report indicates that according to the census of 2001 the total coverage of drinking water in urban areas was 88.21 percent, while in rural areas was 46.38 percent.[342]

- Chile

In its 2004 report on the right to an adequate standard of living (article 12), as part of the discussion of the subordinate right to adequate housing, Chile reported the number of individuals and families lodged in inadequate housing without basic services. The report indicated that in 1998, 5.6 percent of national households were without drinking water, a percentage that was reduced compared to previous years. This and other indicators were included in the report to show that the implementation of the right to housing is improving.[343] Chile also indicated that access to clean drinking water has been an important factor for reducing infant mortality, thus improving the implementation of article 12 on the right to physical and mental health. The report stated that by December 1993, 99.6 percent of the urban population had access to drinking water, and by 1997, 62 percent of the rural population had such service.[344]

The last report submitted by Chile (2011) does not follow the form and content required in the new reporting guidelines concerning the right to an adequate standard of living (article 11). The measures adopted to comply with this right are not clearly separated according to the different rights that form part of it. Furthermore, reference to drinking water is made in relation to the execution of a programme on rural infrastructure that includes potable water for drinking and productive process. The report fails to provide information according to the new reporting guidelines concerning the new structure of article 11, and therefore the right to water.[345]

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[341] ECOSOC, 'Implementation of the International Covenant on Economic, Social and Cultural Rights, Initial Reports Submitted by States Parties in Accordance with Article 16 and 17 of the Covenant, Bolivia', (14 July 1999), UN Doc. E/1990/5/Add.44, paras 387-390.
[342] ECOSOC, 'Implementation of the International Covenant on Economic, Social and Cultural Rights, Second Periodic Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Addendum, Bolivia', (30 January 2007), UN Doc. E/C.12/BOL/2para 77.
[343] ECOSOC, 'Implementation of the International Covenant on Economic, Social and Cultural Rights, Third Periodic Reports Submitted by States Parties in Accordance with Article 16 and 17 of the Covenant, Chile', (10 July 2003), UN Doc. E/1994/104/Add.26, para 548.
[344] ECOSOC, 'Implementation of the International Covenant on Economic, Social and Cultural Rights, Third Periodic Reports Submitted by States Parties in Accordance with Article 16 and 17 of the Covenant, Chile', (10 July 2003), UN Doc. E/1994/104/Add.26, paras 641, 664.
[345] Gobierno de Chile, 'Cuarto Informe Periódico de Aplicación del Pacto Internacional de Derechos Económicos, Sociales y Culturales, de Conformidad a los artículos 16 y 17 del Pacto, Chile', para 113-134 <http://www2.ohchr.org/english/bodies/cescr/future.htm> accessed 21 May 2013.

- Colombia

The last report submitted by Colombia was in January 2008; therefore, there are not yet reports based on the new guidelines. As part of its fourth report, Colombia includes basic sanitation within the implementation measures for the right to adequate housing. The report indicates that drinking water is a decentralised service that can be provided by public or private operators, and it describes the percentage of the population with access to a water supply.[346]

- Annual reports of the Committee on Economic Social and Cultural Rights

The CESCR has the obligation to submit reports to the ECOSOC. In these reports, the CESCR refers to the lack of access to drinking water as a failure to implement the substantive rights embedded in the ICESCR. For example, in 1998 after reviewing the initial report of Israel, the CESCR expressed its concern about the excessive emphasis upon the state as a 'Jewish State', thus encouraging discrimination against non-Jewish citizens. This discrimination affected the standard of living of Israeli Arabs. As a result, they suffer from, inter alia, lack of access to housing, water, electricity and health care. The CESCR also noted that despite each state party's obligations under article 11 of the ICESCR, the government of Israel annually diverts millions of cubic metres of water from the West Bank's Eastern Aquifer Basin. The annual per capita consumption allocation for Palestinians is only 125 cubic metres while Israeli settlers are allocated 1,000 cubic metres per capita. The CESCR also expressed its grave concern about the situation of the Bedouin Palestinians settled in Israel, since they are living below the poverty line and have no access to water, electricity or sanitation. The CESCR called upon Israel to cease its practices of expropriating land, water and resources; demolishing houses; and making arbitrary evictions. Also the CESCR urges Israel to recognise the existing Arab Bedouin villages, the land rights of the inhabitants and their right to basic services, including water.[347]

In the annual report of 2011, the CESCR expressed its concern that Roma people in the Republic of Moldova, and the Al-Akhdam people in Yemen, continue to face social and economic marginalisation and discrimination, particularly in the areas of housing, water and sanitation. Therefore, these countries are not complying with the implementation of article 2 (para 2)[348] ICESCR.[349]

[346] ECOSOC, 'Implementation of the International Covenant on Economic, Social and Cultural Rights, Fifth Periodic Reports Submitted by States Parties in Accordance with Article 16 and 17 of the Covenant, Colombia', (22 January 2008), UN Doc. E/C.12/COL/5, para 728-729.
[347] UN CESCR, 'Report on the Nineteenth Sessions 1998', UN Doc. E/C.12/1998/26, para 236, 250, 252, 254, 267, 268.
[348] ICESCR, Article 2 "2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

When states have failed to provide information regarding the implementation of the right to water, the CESCR has requested those states to provide the necessary information in the following periodic report. This request has been made to Poland[350], Turkey and Estonia[351].

It can be seen from different annual reports that the CESCR generally analyses compliance with the right to water under article 11 of the ICESCR. If there is lack of access to or deprivation of drinking water for the rural or urban population[352], prisoners[353], or displaced people[354] the CESCR considers its compliance under article 11. When lack of access to water or poor water quality may affect the health of individuals, then compliance is analysed under article 12 of the Covenant.[355] This could be explained due to the inextricable connection that exists between the right to water and the right to health, which is recognised by the CESCR. In some cases the CESCR draws state parties' attention to its General Comment 15 on the right to water for a fuller implementation of that right. Likewise, the CESCR also considers it relevant that to ensure the right to education (article 13 and 14)[356], states need to ensure that schools are adequately equipped with water, sanitation and electricity.[357]

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[349] UN CESCR, 'Report on the Forty-Sixth and Forty-Seventh Sessions 2011', UN Doc. E/C.12/2011/3, para 121, 231

[350] UN CESCR, 'Report on the Forty-Second and Forty-Third Sessions 2009', UN Doc. E/C.12/2009/3, para 434

[351] UN CESCR, 'Report on the Forty-Sixth and Forty-Seventh Sessions 2011', UN Doc. E/C.12/2011/3, paras 219, 358.

[352] UN CESCR, 'Report on the Forty-Sixth and Forty-Seventh Sessions 2011', UN Doc. E/C.12/2011/3, paras 134, 249, 267, 311, 315, 393. UN CESCR, 'Report on the Forty-Fourth and Forty-Fifth Sessions 2010', UN Doc. E/C.12/2010/3, paras 100, 209, 249, 371. UN CESCR, 'Report on the Forty-Second and Forty-Third Sessions 2009', UN Doc. E/C.12/2009/3, paras 304, 385. UN CESCR, 'Report on the Fortieth and Forty-First Sessions 2008', UN Doc. E/C.12/2008/3, paras 383.

[353] UN CESCR, 'Report on the Fortieth and Forty-First Sessions 2008', UN Doc. E/C.12/2008/3, para 340.

[354] UN CESCR, 'Report on the Forty-Fourth and Forty-Fifth Sessions 2010', UN Doc. E/C.12/2010/3, paras 136, 371

[355] UN CESCR, 'Report on the Forty-Sixth and Forty-Seventh Sessions 2011', UN Doc. E/C.12/2011/3, paras 267, 315. UN CESCR, 'Report on the Forty-Fourth and Forty-Fifth Sessions 2010', UN Doc. E/C.12/2010/3, para 213. UN CESCR, 'Report on the Forty-Second and Forty-Third Sessions 2009', UN Doc. E/C.12/2009/3, para 348.

[356] ICESCR, Article 13 "1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
(a) Primary education shall be compulsory and available free to all;
(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

These state reports and reports of the CESCR demonstrate that implementation measures to ensure the right to water are mandated as part of the right to an adequate standard of living (article 11), and the right to health (article 12). In some reports the CESCR has also noted the importance of access to water in relation to the right to education (article 13 and 14), since schools should provide basic services including drinking water and sanitation, and to the principle of non-discrimination (article 2 paragraph 2).[358]

3.3.1.3. Reporting under the Convention on the Elimination of All Forms of Discrimination against Women

3.3.1.3.1. Functioning

The Convention on the Elimination of All Forms of Discrimination against Women entered into force on 3 September 1981; currently 187 states have ratified this Convention. To assess the progress made by state parties in the implementation of the Convention, the CEDAW was established in 1982. The CEDAW is composed of twenty-three experts of high moral standing in the fields of women's issues.[359]

State parties must submit reports regarding the implementation of the Convention on the Elimination of Discrimination against Women within one year after the entry into force of the Convention for the state concerned, and thereafter at least every four years, and in

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(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.
3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.
4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State".
ICESCR, Article 14 "Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all".

[357] UN CESCR, 'Report on the Forty-Fourth and Forty-Fifth Sessions 2010', UN Doc. E/C.12/2010/3, para 378

[358] ICESCR, Article 2 (2) "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

[359] Convention on the Elimination of Discrimination against Women, article 17.

addition, whenever the Committee so requests.[360] The CEDAW shall report annually to the UN General Assembly on its activities and may make suggestions and general recommendations based on the reports and information received from state parties.[361]

3.3.1.3.2. Practice

The reporting guidelines[362] of the CEDAW are not as detailed as those adopted by other committees, such as the CESCR or the HRCom. The reporting guidelines describe in general terms the content of the first and subsequent reports, without indicating what specific information should be provided concerning each substantive right embedded in the Convention. Thus, the reporting guidelines do not require specific information on access to drinking water. Nevertheless, article 14[363] of the Convention refers to the appropriate measures that states must take to ensure rural women the right to adequate living conditions, which includes a water supply. Therefore, it is expected that states indicate in their reports the adoption of mechanisms to provide water to realise this right.

In the report submitted by Benin in 2002 it is affirmed that the '*authorities are well aware of the importance of water to human life and of the difficulties encountered by women in supplying water to their families*'. The report only referred to the measures adopted to supply water in rural areas, and the involvement of women in the

[360] Convention on the Elimination of Discrimination against Women, article 17 and 18.
[361] Convention on the Elimination of Discrimination against Women, Article 20 and 21.
[362] UN CEDAW, 'Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties', (5 May 2003), UN Doc. HRI/GEN/2/Rev.1/Add.2
[363] Convention on the Elimination of All Forms of Discrimination against Women, Article 14 "1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetarised sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.
2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:
a) To participate in the elaboration and implementation of development planning at all levels;
b) To have access to adequate health care facilities, including information, counseling and services in family planning;
c) To benefit directly from social security programmes;
d) To obtain all types of training and education, formal and informal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency;
e) To organise self-help groups and co-operative in order to obtain equal access to economic opportunities through employment or self employment;
f) To participate in all community activities;
g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;
h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications".

management of water sources.[364] Even though the importance of water for human life in general is recognised by Benin, the state report does not mention measures taken to supply drinking water to women that are located outside rural areas, who also have difficulties acquiring water for themselves and their families.

Notwithstanding this general tendency, some state reports also indicate that measures have been taken to supply water to others than rural women, or to implement rights other than the adequate standard of living for rural women. For instance, Cameroon indicated in its 1999 report that to improve the health of women and to realise the right of access to primary health care, it is necessary to '*increase the level of access to drinking water in urban and especially rural areas by building new works and introducing a national maintenance policy for the existing installations'.*[365] Access to water plays an important role in the enjoyment of the right to health; therefore, drinking water should be available in both urban and rural areas.

Similarly, in its 2002 report on the right to health (article 12),[366] Ecuador states that its Constitution guarantees the right to health, its promotion and its protection, through the development of food security, the provision of potable water and basic sanitation, among other things.[367] Thus, the provision of drinking water is guaranteed to all regardless of the area where individuals live, whether urban or rural.

Concerning the four states that are the focus of this study, it can be said that:

- Bolivia

In its 2006 report, Bolivia only refers to access to drinking water in rural areas, as part of the implementation of article 14 of the Convention. Bolivia affirmed that in rural areas there are programmes and projects to improve access to drinking water; however,

[364] UN CEDAW, 'Consideration of Reports Submitted by States Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined initial, second and third periodic reports of States Parties, Benin', (7 November 2002), UN Doc. CEDAW/C/BEN/1-3, para 14.7.

[365] UN CEDAW, 'Consideration of Reports Submitted by States Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Initial Reports of States Parties, Cameroon,' (9 May 1999), UN Doc. CEDAW/C/CMR/1, 69.

[366] Convention on the Elimination of Discrimination against Women, Article 12 "1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of man and women, access to health care services, including those related to family planning.
2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, grating free services where necessary, as well as adequate nutrition during pregnancy and lactations".

[367] UN CEDAW, 'Consideration of Reports Submitted by States Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined Fourth and Fifth Periodic Reports of States Parties, Ecuador,' (25 January 2002), UN Doc. CEDAW/C/ECU/4-5, para 216.

the level of coverage is still low.[368] Reference to drinking water is not made in the rest of the country report concerning the implementation of any other right.

- Argentina

According to a country report submitted by Argentina in 2000, a number of projects and programmes were implemented to contribute to the realisation of article 13 (economic and social benefits)[369] of the Convention. For instance, a programme was developed for the improvement of homes and basic infrastructure, which was designed to improve housing, infrastructure and access to land for households with unsatisfied basic needs. This programme aimed to promote women's active participation, to provide them with an alternative work option. As a result, there was a diversification of the task of women, who deal with construction, management, and the use of resources. In a particular province of Argentina (province of Formosa) it was determined that for the settlement of the indigenous Wichi ethnic group, the priority was to construct wells, since women and children are responsible for collecting water to their homes.[370] The idea was to provide women with new skills and to improve their household conditions, including access to drinking water, with their active participation. This project shows that providing women with new skills to improve their living conditions, including access to drinking water, is a right that should be guaranteed to all women and not only to rural women.

- Colombia

In its 1997 report on the implementation of article 13 of the Convention, Colombia stated that since 1990 it began to formulate policies and programmes for the gradual realisation of gender equality for women as a means of eliminating obstacles to access to resources and services. Therefore, a programme to improve housing and its physical environment was established, granting subsidies for both rural and urban woman who are head of a household.[371] Although not explicitly mentioned, it is generally

[368] UN CEDAW, 'Consideration of Reports Submitted by States Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combine second, third and fourth periodic report of States Parties, Bolivia', (27 March 2006), UN Doc. CEDAW/C/BOL/2-4, para 325.

[369] Convention on the Elimination of All Form of Discrimination against Women, Article 13 "States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:
a)The right to family benefits;
b) The right to bank loans, mortgages and other forms of financial credit;
c) The right to participate in recreational activities, sports and all aspects of cultural life".

[370] UN CEDAW, 'Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women, fourth periodic report, Argentina', (8 February 2000), UN Doc. CEDAW/C/ARG/4, 102.

[371] UN CEDAW, ' Consideration of Reports submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women, fourth periodic reports, Colombia', (28 August 1997), UN Doc. CEDAW/C/COL/4, 163, 169 and 170.

understood that improving housing conditions also includes measures to acquire access to basic services, such as drinking water and electricity. The Convention proposes a greater protection to rural women, but this does not mean that the right to an adequate standard of living is an exclusive right for rural women. This programme also illustrates that the right to an adequate standard of living, which includes access to drinking water, is guaranteed equality to rural as well as urban women.

- Chile

In its 2004 report on the implementation of article 14 (rural women), Chile indicated that despite the progress that it had made in the last decade in reducing poverty, improving access to higher education, and improving housing and basic services, it has not been able to sufficiently close the gap between rural and urban living standards. Unfavourable living conditions in rural areas drive people from the countryside to the cities, where instead of finding solutions to their poor living conditions they frequently end up joining the ranks of the urban poor.[372] Chile developed a programme to modernise rural areas by providing electrification, safe drinking water and enhanced subsidies for housing in the rural areas.[373]

- Reporting of the Committee on Elimination of Discrimination Against Women

It is worth mentioning that the CEDAW not only recommends that states provide drinking water to improve the standard of living of rural women, [374] but it also recommends that states provide water to other groups of women. The CEDAW recommended that Ghana (2006), Philippines (2006) and Suriname (2007) ensure access to clean water for indigenous women or women of various ethnic groups.[375] The CEDAW refers to rural women and indigenous women separately, indicating that these are two different groups. When the CEDAW expresses its concern about the precarious situation of rural women, who for instance lack access to health care and drinking water, it mentions indigenous women, too. Moreover, the CEDAW adopted a common recommendation for these two groups of women, indicating that the state should ensure that rural and indigenous women have access to the services they lack, including drinking water. By doing so, the CEDAW is extending the scope of application of Article 14(h).

[372] UN CEDAW, 'Consideration of Report submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women, Fourth Periodic Report, Chile', (17 May 2004), UN Doc. CEDAW/C/CHI/4, paras 361-364.
[373] UN CEDAW, 'Consideration of Report submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women, Third Periodic Report of State Parties, Chile', (27 January 1999), UN Doc. CEDAW/C/CHI/3, 33.
[374] UN CEDAW, 'Report of the Committee on the Elimination of Discrimination against Women, 34th, 35th, 36th Sessions', (16 January-25 August 2006), UN Doc A/61/38, paras 92, 244-245, 342-343.
[375] UN CEDAW, 'Report of the Committee on the Elimination of Discrimination against Women, 37th,38th and 39th Sessions, (15 January-10 August 2007), UN Doc A/62/38, para 314-315; UN CEDAW, 'Report of the Committee on the Elimination of Discrimination against Women, 34th, 35th, 36th Sessions', (16 January-25 August 2006), UN Doc A/61/38, paras 244-245, 537-538.

It is of particular relevance that when the CEDAW is confronted with a situation of water contamination, it urges the state party to ensure safe drinking water to all, while in cases where the situation is about lack of access to drinking water, particularly affecting rural areas, the CEDAW recommends that state parties take the necessary measures to provide access to this resource only to rural women. Regarding a particular situation of arsenic poisoning of water in Bangladesh, the CEDAW indicated, in 2004, its concern about the situation, which was disproportionally affecting rural women. The CEDAW urged Bangladesh to put in place measures for ensuring that safe drinking water was available to all, and particularly affected rural women.[376] In fact, in this case the CEDAW is categorical in its recommendation, and it even goes out of the scope of the Convention to make it clear that safe drinking water needs to be available to *all* in this circumstance.

Moreover, although the CEDAW is particularly concerned about the precarious state of women's health in Burkina Faso, especially in rural areas of the country, the CEDAW recommended that access to primary health service and drinking water should be facilitated to women.[377] The recommendations are not addressed only to the restricted group of rural women, but to women in general.

The recommendations made by the CEDAW to guarantee the rights and services indicated in article 14, can be interpreted in two ways. First, the rights established in article 14 are not exclusive to rural women, as has been argued by some, and therefore other women are covered by the protections of this right, for instance urban or indigenous women living in precarious conditions. Second, although the application of this right is in principle limited to rural women, since it takes into account the particular problems that they have faced, the CEDAW is nevertheless extending it, including at least indigenous women. Additionally, it can be concluded that safe drinking water is a relevant measure to assess the right to health (article 12) of women in general, including rural, urban and indigenous women.

3.3.1.4. Reporting under the Convention on the Rights of the Child

3.3.1.4.1. Functioning

The Convention on the Rights of the Child entered into force on 2 September 1990, and currently 192 states are party to this Convention. For the purpose of examining the progress made by state parties the CRC was established in 1991, which is composed of eighteen independent experts.

[376] UN CEDAW, 'Report of the Committee on the Elimination of Discrimination against Women, 30th, 31st , and 32nd Sessions', (12 January-6 July 2004), UN Doc A/59/38, paras 259-260.
[377] UN CEDAW, 'Report of the Committee on the Elimination of Discrimination against Women, 22th and 23rd, Sessions', (17 January-12 June 2000), UN Doc. A/55/38, paras274-276.

States should submit reports within two years after the entry into force of the Convention for the state party concerned and thereafter every five years.[378] The CRC must submit to the UN General Assembly reports on its activities every two years.[379]

3.3.1.4.2. Practice

The last reporting guidelines of the CRC were adopted in 2010.[380] The CRC guidelines request that states provide information on the *'percentage of households without access to hygienic sanitation facilities and access to safe drinking water*' as part of the implementation of article 24 on health and health services.[381]

Given that access to drinking water forms part of the right to health under the Convention, and that the CRC also requests statistical data on this issue, it is expected that the measures adopted and reported by state parties are connected with that right.

In its 2010 report on the implementation of the right to health (article 24), Israel mentioned the importance of guaranteeing access to drinking water to its Bedouin population, a desert-dwelling Arabian ethnic group. Israel pointed out that seventy percent of Bedouins live in planned, urban towns, with municipal infrastructure, including running water in every home that meets the Israeli standards for drinking water quality. However, since nearly 62,000 Bedouin live in illegal clusters or villages that are difficult to supply with necessary services, especially water. Israel decided to build 'Water Centres' to supply water to the illegal clusters in order to improve the living conditions of the Bedouin population.[382]

Some state parties also report access to water in connection with the implementation of other human rights embedded in the Convention. For instance, Lithuania is devoted to reduce child poverty and social exclusion through financial assistance to families with very low incomes. Therefore, in order to guarantee implementation of article 26[383] of

[378] Convention on the Rights of the Child, Articles 43-44.
[379] Convention on the Rights of the Child, Article 44(5).
[380] UN CRC, 'Treaty-Specific Guidelines Regarding the Form and Content of Periodic Reports to be Submitted by States Parties under Article 44, paragraph 1(b), of the Convention on the Rights of the Child', (23 November 2010), UN Doc. CRC/C/58/Rev.2.
[381] UN CRC, 'Treaty-Specific Guidelines Regarding the Form and Content of Periodic Reports to be Submitted by States Parties under Article 44, paragraph 1(b), of the Convention on the Rights of the Child', (23 November 2010), UN Doc. CRC/C/58/Rev.2, 15.
[382] UN CRC, 'Consideration of the Reports Submitted by States Parties under Article 44 of the Convention, Combined second, third and fourth periodic reports of States Parties due in 2008, Israel', (11 June 2010), UN Doc. CRC/C/ISR/2-4, paras 563-567.
[383] Convention on the Rights of the Child, Article 26 "1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.
2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child".

the Convention (the right of every child to benefit from social security), the state wants to ensure that families with children, who for genuine reasons do not have the means to support themselves or to pay for public utilities, receive a social allowance and subsidies covering expenditure on heating as well as cold and hot water.[384]

Likewise, Rwanda is very conscious about the necessity to provide drinking water to children in order to guarantee some of the rights embraced in the Convention. In its 2011 report, Rwanda indicated that with regard to the implementation of the right to health (article 24), it has adopted policies and programmes aimed at reducing maternal and infant morbidity and mortality, and improving access to drinking water. As a result, a National Nutrition Policy (2005) was adopted to enhance the nutritional status of the population, in general, and of the child and mother in particular, by increasing access to drinking water and promoting education on hygiene. Rwanda also recognised that efforts to implement the right to life, survival and development (article 6)[385] has improved; however, access to drinking water, social protection and nutrition deserve major investments from the state and its partners for the realisation of this right.[386] In order words, Rwanda considers that by improving access to drinking water, protection of the right to life will also improve.

Concerning the states that are the focus of this study it can be said that:

- Colombia

In its first report in 1993, Colombia declared that it is working on addressing unsatisfied basic needs, including basic education, primary health care, infant nutrition, housing, and drinking water. These are the same issues addressed by the National Programme in Favour of Children.[387] The 2005 report mentioned that clean drinking water is considered an essential element to the right to health. In this report Colombia affirmed that the '*health of Colombian children will be better protected if the quality of drinking water and other environmental resources are monitored effectively'*.[388]

[384] UN CRC, 'Consideration of the Reports Submitted by States Parties under Article 44 of the Convention, Consolidated third and fourth periodic reports of States parties due on 2009, Lithuania', (23 February 2010), UN Doc. CRC/C/LTU/3-4, paras 9, 313.
[385] Convention on the rights of the Child, Article 6 "1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child".
[386] UN CRC, 'Consideration of reports submitted by States parties under article 44 of the Convention, Consolidated third and fourth periodic reports of States parties due in 2008, Rwanda", (21 January 2011), UN Doc. CRC/C/RWA/3-4, paras 115, 199.
[387] UN CRC, 'Examen de los Informes Presentados por los Estados Partes con Arreglo al Artículo 44 de la Convención, Informes Iniciales que los Estados Partes deben Presentar en 1993, Colombia', (10 June 1993), UN Doc. CRC/C/8/Add.3, para 24.
[388] UN CRC, 'Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Third Periodic Reports of States Parties due in 2003, Colombia', (24 August 2005), UN Doc. CRC/C/129/Add.6 para 469.

- Bolivia

According to the reports submitted by Bolivia in 1992 and 2002, access to water is essential to ensuring the right to health as well as survival and development of the child. Therefore, Bolivia is working on the expansion of coverage of household drinking water.[389] Bolivia reported that, in conjunction with vaccination programmes, it is important to develop basic water and sanitation services to achieve greater protection of the health of children. Likewise, it indicated that there has been an increase in the availability of housing with drinking water, from 71 percent to 85 percent between 1997 and 2000, which is considered to be an improvement in the implementation of the right to health.[390]

- Argentina

In the Argentine report of 2009 reference to clean water is not always related to the right to health. In some cases access to drinking water is reported in connection with the right to an adequate standard of living (article 27)[391]. To prevent a decline in living standards, public expenditures are devoted to housing, town planning, drinking water and sewerage. Also, to guarantee the right to education for children (article 28), it is necessary to improve educational infrastructure. Therefore, a project was developed to provide essential services for educational premises, including the supply of drinking water.[392] Regarding implementation of article 4[393], Argentina indicated that it had made

[389] UN CRC, 'Examen de los Informes Presentados por los Estados Partes con Arreglo al Artículo 44 de la Convención, Informes Iniciales que los Estados Partes deben Presentar en 1992, Bolivia', (28 September 1992), UN Doc. CRC/C/3/Add.2, para 131.

[390] UN CRC, 'Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Third Periodic Report of States Parties due in 2002, Bolivia', (13 November 2002), UN Doc. CRC/C/125/Add.2, paras 117, 128.

[391] Convention on the Rights of the Child, Article 27 "1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regards to nutrition, clothing and housing.
4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

[392] UN CRC, 'Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Third and Fourth Periodic Reports of States Parties due in 2004, Argentina', (16 September 2009), UN Doc. CRC/C/ARG/3-4, paras 671, 714.

[393] Convention on the Rights of the Child, Article 4 "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation".

significant increases in public expenditure on social services that include drinking water.[394]

- Chile

In its 1993 and 2001 reports, Chile clearly indicated the importance of access to drinking water to fulfil the right to health. It stated that the increase in the levels of sanitation (drinking water and sewerage) has been an important factor in the level of health attained, particularly since tap drinking water is fundamental in reducing the problem of diarrhoeal illness.[395]

To improve its implementation of the right to health (art. 24) and the right to survival and development (art. 6), Chile developed a National Health Strategy (2011-2020) to prioritise certain plans addressed to reduce mortality. One of the strategies is to improve the provision of drinking water and thus to reduce the disparity that exists between rural and urban areas.[396] Chile introduced a system of social protection to improve the living condition of the poorest families, such as financial subsidies covering the entire cost of water consumption up to 15 cubic meters per month. This measure contributed to realisation of article 3 paragraph 1 of the Convention (the best interest of the Child).[397]

- Reports of the Committee on the Rights of the Child

In its reports, the CRC recommends that state parties guarantee access to safe drinking water for the realisation not only of the right to health, but also of the right to an adequate standard of living.

For instance, regarding the right to an adequate standard of living, the CRC recommended that Chile prioritise and allocate sufficient funds to counteract the increasing inequality and reduce the discrepancies in the standard of living between urban and rural areas. The Committee highlighted the need to strengthen the capacity of departmental and municipal authorities to provide basic services. In particular, increased access to clean drinking water and sewage disposal should be a priority in rural areas.[398] The CRC made similar recommendations concerning access to drinking water to

[394] UN CRC, 'Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Third and Fourth Periodic Reports of States Parties due in 2004, Argentina', (16 September 2009), UN Doc. CRC/C/ARG/3-4, para 189.
[395] UN CRC, 'Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Initial Reports of States Parties due in 1993, Chile', (22 June 1993), CRC/C/3/Add.18, para 116; UN CRC, 'Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Periodic Reports of States due in 1997, Chile', (25 June 2001), UN Doc. CRC/C/65/Add.13, para 676.
[396] Gobierno de Chile, '4 y 5 Informe Consolidado de Aplicación de la Convención sobre los Derechos de los Niños y sus Protocolos Facultativos, Chile', (September 2012), <http://www2.ohchr.org/english/bodies/crc/crcs70.htm> accessed 7 May 2013.
[397] UN CRC, 'Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Third periodic Report of States Parties due in 1997, Chile', (20 December 2005), UN Doc. CRC/C/CHL/3, para 48.
[398] UN CRC, 'Report on the Forty-Fourth Session', (13 March 2008), UN Doc. CRC/C/44/3, para 633.

Colombia and Turkmenistan, intended to improve the implementation of the right to an adequate standard of living, particularly in rural areas.[399] Likewise, the CRC expressed concern that some Roma communities located in Slovakia continue to live in substandard racially segregated settlements, exposed to environmental hazards, without equal access to adequate housing, and with limited or no access to basic public services including clean drinking water. Therefore, it recommended that Slovakia take all necessary measures to ensure that all communities, including Roma communities, are given equal access to land, adequate housing, sanitation infrastructure, and water, and are protected from environmental hazards.[400] Furthermore, the CRC recommended that Kazakhstan ensure access to clean drinking water and sanitation in all regions of the country in accordance with article 27 of the Convention (adequate standard of living).[401]

Concerning the protection of the right to health, the CRC recommended that Kenya improve access to safe drinking water and sanitation facilities, and that ensure the sustainability, availability, sufficiency and affordability of water and sanitation to all, particularly to children.[402] In the case of Georgia the CRC expressed its concern about the marked disparities in the quality of water, which continues to have a negative impact on the health of the population in rural areas. Therefore, it recommended that Georgia – in the light of article 24 (2)(c) of the Convention – take measures to prevent and combat the damaging effects of low-quality or contaminated water supplies, taking into account the particular vulnerability of children.[403]

Based on state reports and the recommendations made by the CRC it is clear that access to drinking water is an important element for the realisation of the right to health, as explicitly indicated in the Convention. Although neither the Convention nor the reporting guidelines give any indication of the connection between access to drinking water and other rights, the aforementioned reports consider access to water as a relevant element for the implementation of other rights, such as the right to an adequate standard of living, the right to education and the right to survival and development.

3.3.1.5. Reporting under the Convention on the Rights of Persons with Disabilities

3.3.1.5.1. Functioning

The Convention on the Rights of Persons with Disabilities entered into force 3 May 2008, and today there are 130 state parties to this Convention. With the purpose to monitor the implementation of the Convention a Committee on the Rights of Persons

[399] UN CRC, 'Report on the Forty-Second Session', (3 November 2006), UN Doc. CRC/C/42/3, paras 88, 746
[400] UN CRC, 'Report on the Forty-Fifth Session', (3 December 2007), UN Doc. CRC/C/45/3, paras 79-80
[401] UN CRC, 'Report on the Forty-Fifth Session', (3 December 2007), UN Doc. CRC/C/45/3, para 438
[402] UN CRC, 'Report on the Forty-Fourth Session', (13 March 2008), UN Doc. CRC/C/44/3, para 118.
[403] UN CRC, 'Report on the Forty-Eight Session', (16 November 2009), UN Doc. CRC/C/48/3, 14-15.

with Disabilities (hereinafter CRPD) was established. The CRPD is composed of eighteen members that are experts in the fields covered by the Convention.[404]

States must report within two years of accepting the Convention and thereafter every four years and whenever the CRPD so requests.[405] The CRPD may request further information from state parties relevant to the implementation of the Convention.[406] The CRPD must report every two years to the UN General Assembly and to the ECOSOC on its activities. The suggestions and general recommendations of the CRPD, made based on the examination of state reports, must be included in this report together with any comments from state parties.[407]

3.3.1.5.2. Practice

The CRPD adopted the reporting guidelines in October 2009.[408] The guidelines indicate that states should provide information on the substantive rights embedded in the Convention. In particular regarding article 28[409] on the right to adequate standard of living and social protection, states should report on the measures taken to ensure availability and access by persons with disabilities to clean water, adequate food, clothing and housing.[410]

Significantly, the guidelines include access to clean water with the other components of the right to an adequate standard of living, such as food, clothing and housing, instead

[404] Convention on the Rights of Persons with Disabilities, Article 34.
[405] Convention on the Rights of Persons with Disabilities, Article 35.
[406] Convention on the Rights of Persons with Disabilities, Article 36.
[407] Convention on the Rights of Persons with Disabilities, Article 39.
[408] UN CRPD, 'Guidelines on Treaty-Specific Documents to be submitted by States Parties under Article 35, Paragraph 1, of the Convention on the Rights of Persons with Disabilities', (18 November 2009), UN Doc. CRPD/C/2/3.
[409] Convention on the Rights of Persons with Disabilities, Article 28 "1. States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.
2. States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures:
a) To ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs;
c) To ensure access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes;
c) To ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care;
d) To ensure access by persons with disabilities to public housing programmes;
e) To ensure equal access by persons with disabilities to retirement benefits and programmes".
[410] UN CRPD, 'Guidelines on Treaty-Specific Documents to be submitted by States Parties under Article 35, Paragraph 1, of the Convention on the Rights of Persons with Disabilities', (18 November 2009), UN Doc. CRPD/C/2/3, 16.

of including access to clean water in the section on the measures that should be adopted to implement the right to social protection. According to article 28 of the Convention, access to water is considered to be part of the right to social protection.

Since the adoption of the Convention a limited number of state reports have been examined by the CRPD. Only in April 2011 was the first state report considered.[411] As a result, a smaller number of concluding observations have been adopted by the CRPD.

Regarding the implementation of article 28 of the Convention on the right to adequate living and social protection, Tunisia indicated that health and education facilities, electricity and clean drinking water have been made available in remote areas through the national solidarity fund.[412] China indicated that part of the implementation of article 28 consists of meeting the basic needs of poor persons with disabilities, including clean drinking water and sufficient food and clothing, which have been achieved by various policies and measures that assist and support these persons.[413]

The state reports of Argentina[414] and Croatia[415], both submitted in 2011, indicate that the supply of drinking water is a measure to implement article 11[416] on situations of risk and humanitarian emergencies.

As part of the measures adopted to implement article 9, accessibility, Uganda mentioned a project carried out in 2000 that helped to make water accessible to disable persons by designing disability-friendly boreholes which have been placed in some schools and Sub-Counties in Northern Uganda.[417]

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[411] UN CRPD, 'Report of the Committee on the Rights of Persons with Disabilities on its First Session', (8 October 2009), UN Doc. CRPD/C/1/2; UN Committee on the Rights of Persons with Disabilities, 'Report of the Committee on the Rights of Persons with Disabilities on its Fifth Session', (5 April 2012), UN Doc. CRPD/C/5/5, para 22.

[412] UN CRPD, 'Implementation of the International Convention on the Rights of Persons with Disabilities, Initial Report Submitted by State Parties under Article 35 of the Covenant, Tunisia', (14 July 2010), UN Doc. CRPD/C/TUN/1, para 214.

[413] UN CRPD, 'Implementation of the International Convention on the Rights of Persons with Disabilities, Initial Report Submitted by State Parties under Article 35 of the Covenant, China', (8 February 2011), UN Doc. CRPD/C/CHN/1, para 127.

[414] UN CRPD, 'Implementation of the International Convention on the Rights of Persons with Disabilities, Initial Report Submitted by State Parties under Article 35 of the Covenant, Argentina', (28 June 2011), UN Doc. CRPD/C/ARG/1, paras 163 166

[415] UN CRPD, 'Implementation of the Convention on the Rights of Persons with Disabilities, Initial Reports Submitted by States Parties Under Article 35 of the Convention, Croatia,' (27 October 2011), UN Doc. CRPD/C/HRV/1, para 54.

[416] Convention on the Rights of Persons with Disabilities, Article 11 "States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters".

[417] Government of Uganda, 'Uganda's Initial Status Report 2010', para 83, http://www.ohchr.org/EN/HRBodies/CRPD/Pages/futuresessions.aspx accessed 20 May 2013.

In the reports of the CRPD to the General Assembly, the CRPD made a number of statements regarding particular emergency situations, such as the earthquake in Qinghai, China, and the floods in Pakistan. It urges states to ensure access to drinking water among other basic services during such emergencies.[418]

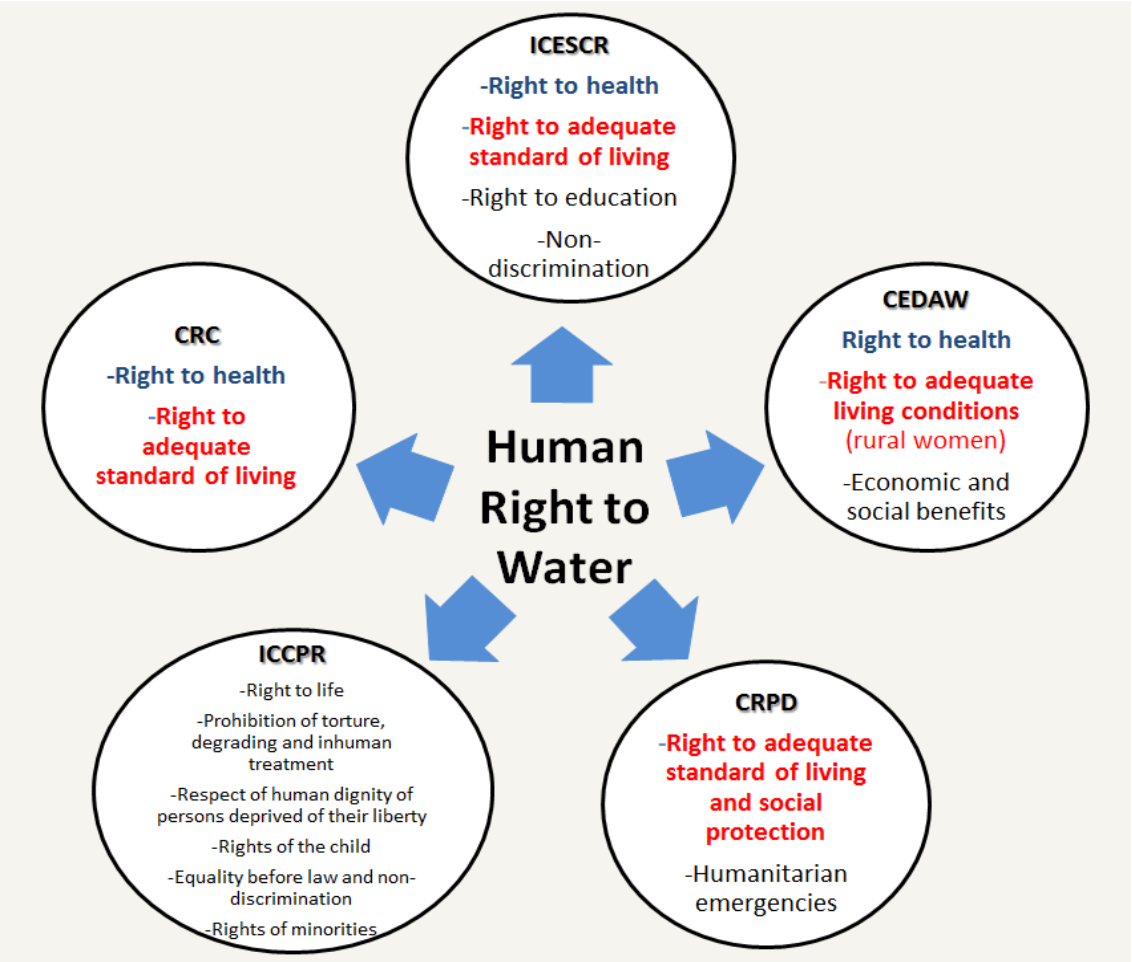
The aforementioned reports indicate how access to water contributes to the realisation of the rights of persons with disabilities, particularly article 28 on adequate standard of living and social protection, and article 11 on situations of risk and humanitarian emergencies.

- General outcome of state practice regarding the implementation of international human rights conventions

In summary, based on the foregoing state reports and reports submitted by the respective Committees under the five Conventions, although not all those Conventions contain an explicit reference to drinking water, safe drinking water is nevertheless considered to be a relevant element for the realisation of a number of human rights embedded in those Conventions. Drinking water is deemed to be important for the implementation of both civil and political rights as well as economic, social and cultural rights. There are two human rights most frequently repeated in those reports: the right to health and the right to an adequate standard of living. In addition, the CESCR is requesting states to report on the implementation of the right to water as an independent right, an instruction that some states have started to follow.

Below is a graph that illustrates the results of the foregoing examination of reports. Access to safe drinking water is considered to be an essential element for the realisation of a number of recognised human rights. Correspondingly, the lack of access to drinking water may be considered to be an infringement of the same rights. Particularly, the figure shows that there are two recurrent human rights among the five Conventions under study that are considered to be inextricably connected with access to safe drinking water. Those rights are: the right to health and the right to an adequate standard of living.

[418] UN CRPD 'Report of the Committee on the Rights of Persons with Disabilities 1st, 2nd 3rd, 4th sessions', (23 February 2009- 8 October 2010), UN Doc. A/66/55, Annex XIII para 4, Annex XIV para 7.



3.3.2. Contentious cases under universal human rights conventions

At the international level, there are three different mechanisms to review complaints about the violation of rights contained in international human rights conventions. The main procedures for bringing complaints are: individual communications, state-to-state complaints, and inquiries. These procedures are handled by the respective Committees to ensure compliance with the international human rights conventions. Since the inquiry procedure is confidential, and the state-to-state complaint mechanisms have never been used, we only have the opportunity to examine individual communications.

The human rights treaty bodies of the five conventions under study (HRCom, CESCR, CEDAW, CRC and CRPD) may under certain conditions receive and consider individual complaints or communications from individuals regarding violation of human rights. Most of the international conventions on human rights agreed under the auspices of the UN have adopted an Optional Protocol whereby state parties recognise the competence of the respective committee to examine such a procedure. The only committee that does not have such a competence yet is the CRC, mainly because the

Optional Protocol to the Convention on the Rights of the Child has not yet entered into force.

A state party to the Optional Protocol of the respective international human rights conventions recognises the competence of the corresponding treaty body to receive and consider individual communications as provided for in the respective Optional Protocol. Communications may be submitted by or on behalf of individuals or a group of individuals claiming to be victims of a violation, by a state party, of any of the rights set forth in the respective convention.[419] Before submitting a communication, individuals must have exhausted all available domestic remedies.[420]

Each committee must bring any communication submitted to it under the respective Optional Protocol to the attention of the state party concerned. Within six months, the receiving state must submit written explanations or statements clarifying the matter and describing any remedy that the state party may have implemented. The committees are to consider communications in the light of all documentations made available to them, provided that the documentation is transmitted to the parties concerned.[421]

At any time after the receipt of a communication and before a decision on the merits is adopted, the committees may transmit to the state party for its urgent consideration a request that the state party take any interim measures as may be necessary in exceptional circumstances to avoid possible irreparable damages to the victims of the alleged violations.[422]

[419] Optional Protocol to the International Covenant on Civil and Political Rights, Articles 1; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Articles 1 and 2; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Articles 1 and 2; Optional Protocol to the Convention on the Rights of Persons with Disabilities, Article 1.

[420] Optional Protocol to the International Covenant on Civil and Political Rights, Article 2; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Article 3; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Article 4; Optional Protocol to the Convention on the Rights of Persons with Disabilities, Article 2.

[421] Optional Protocol to the International Covenant on Civil and Political Rights, Article 4; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Articles 6 and 8; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Articles 6 and 7; Optional Protocol to the Convention on the Rights of Persons with Disabilities, Articles 3 and 5.

[422] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, article 5; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Article 5; Optional Protocol to the Convention on the Rights of Persons with Disabilities, Article 4; Rules of Procedure of the Human Rights Committee (adopted by the HRCom at its first and second session and last amended at the HRCom's 2852 meeting during its 103rd session), (11 January 2012) CCPR/C/3/Rev.10, Rule 92.

Individual complaints under the ICCPR are available since 1976, whilst this mechanism has only been adopted in recent years for the other conventions. As a result the jurisprudence[423] of the CESCR, CEDAW and CRPD is limited.

The complaint procedures give a real meaning and content to the rights embraced in the human rights conventions, since they may clarify the content of the rights and states' obligations, both in the cases at hand and through the general case law of the treaty bodies.[424] Individual complaints are examined with the purpose of determining whether access to water may be considered to be essential for the realisation of certain human rights, and if it has been recognised as an independent right.

In human rights literature the decisions (known as 'views' or 'opinions') of the different treaty bodies are claimed to be comparable with judicial decisions (quasi-judicial), although they are not legally binding.[425] The HRCom considers that while its function '*in considering communications is not, as such, that of a judicial body, the views issued by the Committee under the Optional Protocol exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions*'.[426] Decisions are authoritative interpretations of the respective conventions that determine to what extent, if any, a state has failed to comply with its obligation.[427] If a violation has been found it asserts a remedy for that violation. As a consequence, state parties are required to take the necessary measures to remedy any violation and bring their conduct into conformity with the respective convention.[428] In addition, some authors consider that views are 'in effect' binding, since it is considered that they are strong indicators of legal obligations.

[423] It is considered that the 'views' adopted by the treaty bodies of the UN human rights treaty have a judgment-like quality. Birgit Schlütter, 'Aspects of Human Rights Interpretation by the UN Treaty Bodies', in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies, Law and Legitimacy* (CUP, Cambridge 2013) 266.

[424] Geir Ulfstein, 'Individual Complaints' Hellen Kellen and Geir Ulfstein (eds) in, *UN Human Rights Treaty Bodies, Law and Legitimacy* (CUP, Cambridge 2012) 75.

[425] Geir Ulfstein, 'Individual Complaints' Hellen Kellen and Geir Ulfstein (eds) in, *UN Human Rights Treaty Bodies, Law and Legitimacy* (CUP, Cambridge 2012) 92-93. Philip Alston and Ryan Goodman, *International Human Rights, The Successor to International Human Rights in Context: Law, Politics and Morals* (OUP, Oxford 2013) 834. Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (CUP, Cambridge 2013) 296.

[426] UN HRCom, General Comment 33, The Obligations of States Parties under the Optional Protocl to the International Covenant on Civil and Political Rights", 13-31 October 2008, UN Doc. CCPR/C/GC/33, para 11.

[427] Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (CUP, Cambridge 2013) 297.

[428] Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (CUP, Cambridge 2013) 297; UN HRCom, General Comment 33 The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights", 13-31 October 2008, UN Doc. CCPR/C/GC/33, paras 12-14.

Therefore, state rejection of a committee opinion is evidence of that state's bad faith towards its conventional obligations.[429]

3.3.2.1. Individual communications under the International Covenant on Civil and Political Rights

The Optional Protocol to the International Covenant on Civil and Political Rights entered into force on March 1976.[430] It established the first complaint procedure for individual communications.

A large number of individual communications have been received and considered by the HRCom. Some of the communications contain complaints for lack of access to water. Most of these communications were submitted by or on behalf of persons claiming to have been deprived of their liberty in violation of article 10, or to have been subjected to torture or ill treatment in violation of article 7. In a decision adopted in 1994 Essono Mika alleged that he was deprived of food and water for several days after his arrest on 16 August 1988, tortured during two days and left without medical assistance for several weeks thereafter. The state party did not refute these allegations. In this case the HRCom concluded that the deprivation of food and water during arrest amounted to cruel and inhuman treatment in violation of article 7, as well deprivation of liberty in violation of article 10, paragraph 1, of the ICCPR.[431] In similar cases, where it is alleged that the detained or arrested persons suffered from deprivation of drinking water and other poor conditions, the HRCom has concluded that there was a violation of both article 7 and article 10 of the ICCPR, because the treatment constitutes torture and because a prisoner must be treated with humanity and with respect for his inherent dignity. [432] In a complaint alleging the detainee was subject to ill-treatment due to poor detention conditions, including lack of food and water, the HRCom asserted that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they must be treated with humanity and respect for their dignity.[433] On the other hand, the HRCom has

[429] S. Joseph, J. Schultz and M. Castan, The international Covenant on Civil and Political Rights: Cases, Materials and Commentary (2nd, OUP, Oxford 2004), 24, cited in Geir Ulfstein, 'Individual Complaints' Hellen Kellen and Geir Ulfstein (eds) in, *UN Human Rights Treaty Bodies, Law and Legitimacy* (CUP, Cambridge 2012) 92-93.

[430] Optional Protocol to the International Covenant on Civil and Political Rights (adopted on 16 December 1966, entered into force on 23 March 1976) 999 UNTS 171.

[431] UN HRCom, *Essono Mika Miha v Equatorial Guinea*, Communication 414/1990, 8 July 1994, para 6.4.

[432] UN HRCom, *Albert Wilson v the Philippines,* Communication 868/1999, 30 October 2003;UN HRCom, *Ashraf Ahmad El Hagog Jumaa v Lybia,* Communication 1755/2008, 19 March 2012;. UN HRCom, *Omar Faruk Bozbey v Turkmenistan*, Communication 1530/2006, 27 October 2010; UN HRCom Communication No. 1880/2009, N.S. Nenova et al v Libya, Communication 1880/2009, 20 March 2012.

[433] UN HRCom, *Edriss El HAssy v The Libyan Arab Jamahiriya*, Communication 1422/2005, 24 October 2007.

considered inadmissible allegations of deprivation of food and water during detention, when these allegations have been insufficiently substantiated and the claims were presented in very general terms.[434]

In another communication, the HRCom found the lack of access to water to be a circumstance leading to the violation of other human rights under the ICCPR, arbitrary or unlawful interference with privacy, family, home and correspondence (article 17). The individual communication[435] refers to the Dobri Jeliazkov community, consisting of impoverished Roma people, residing in a particular piece of land for over seventy years in Bulgaria. During this time the housing of the community has been de facto recognised by the public authorities. In July 2006, the inhabitants of the community were sent an 'invitation letter' requesting them to leave the houses constructed unlawfully on municipal land. The community did not comply with this request, and ten days afterwards the municipality issued an eviction order against the Dobri Jeliazkov community. An association representing the community appealed the eviction order. In April 2008 the Sofia City Court ruled that the eviction order was lawful. This decision was then appealed, and the Supreme Administrative Court upheld it in October 2009. In an attempt to force the community to leave, the municipality asked the water company to cut off the water supply to the community. The HRCom, acting through its Special Rapporteur on new communications and interim measures, reiterated a previous request for interim measures of protection. The HRCom states that *'while the authors have not been forcibly evicted, cutting off the water supply to the community could be considered as indirect means of achieving eviction*'.[436] Consequently, Bulgaria was requested to re-establish the water supply to the Dobri Jeliazkov community.

The previous cases illustrate that the lack of access to water can lead to the violation of some civil and political rights, even though access to this resource is not explicitly mentioned as part of those rights in the ICCPR. Since water is an essential element for life, health, and well-being; it is understandable that the deprivation of this resource can lead to the violation of different human rights.

[434] UN HRCom, *Aleksander Smantser v Belarus*, Communication 1178/2003, 23 October 2008.
[435] UN HRCom, *Liliana Assenova Naidenova et al v Bulgaria* Communication 2073/2011, 30 October 2012, para 10.
[436] UN HRCom, *Liliana Assenova Naidenova et al v Bulgaria,* Communication 2073/2011, 30 October 2012, para 10.

3.3.2.2. Individual communications under the Covenant on Economic, Social and Cultural Rights

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICECSR)[437] was adopted by resolution A/RES/63/117 on 10 December 2008 during the sixty-third session of the General Assembly.

According to the OP-ICESCR the CESCR can receive and consider communications. As part of this competence the CESCR must make available its good offices to the parties concerned with a view to reaching a friendly settlement of the matter on the basis of the respect for obligations set forth in the ICESCR. An agreement on a friendly settlement closes considerations of the communication under the OP-ICESCR.[438]

Owing to the recent entry into force of the OP-ICESCR, on 5 May 2013, there is not yet an individual communication considered by the CESCR regarding the possible violation of rights embedded in the ICESCR.

3.3.2.3. Individual communications under the Convention on the Elimination of All Forms of Discrimination against Women

The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women[439] entered into force on 22 December 2000.

To date, the CEDAW has considered thirteen different individual communications, dealing with topics related to change of name, domestic violence, and the right to health care, among others. Only one communication deals with a violation of article 14, paragraph 2(h) of the Convention, which is the only article that explicitly refers to access to drinking water. However, this communication deals with equality between men and women on the right to access to housing, not the right to water.[440] So far, none of the individual communications considered by the CEDAW deals with problems related to access to water. Nevertheless, due to the poor housing conditions in which many women still live, as well as the health problems that lack of access to drinking water generates, it is likely that future cases will deal with such issues. For now there is no jurisprudence that can shed light on whether the CEDAW will use the right to an adequate standard of living (article 14, paragraphs 2(h)) also to protect non-rural women, or if the CEDAW will start linking the right to water with other women's rights.

[437] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted on 10 December 2008, entered into force on 5 May 2013) C.N.869.2009.TREATIES 34.
[438] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Article 7.
[439] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (adopted 6 October 1999, entered into force 22 December 2000) 2131 UNTS 83.
[440] UN Committee on the Elimination of Discrimination against Women, *Cecilia Keel v Canada*, Communication 19/2008, 28 February 2012.

3.3.2.4. Individual communications under the Convention on the Rights of Persons with Disabilities

The Optional Protocol to the Convention on the Rights of Persons with Disabilities entered into force on 3 May 2008.[441]

To date, the CRPD has only considered two individual communications. The first communication involved a woman in Sweden who suffers from a chronic connective tissue disorder and required water therapy to stabilise her condition and for her rehabilitation. She requested an authorisation to build an exercise pool at her home, which was within an area protected under development plans. Her request was rejected by the local authorities as it would contravene the development plans. The CRPD concluded that the decision of the local authorities to refuse to allow the building of the hydrotherapy pool was disproportionate and produced a discriminatory effect that adversely affected the woman's access, as a person with disability, to the health care and rehabilitation required for her specific conditions, thus violating articles 5, 25 and 26 of the Convention.[442] The second communication was related to a case of redundancy allegedly due to the diabetes of the employee. The Committee considered the communication inadmissible since the facts occurred prior to the entry into force of the Optional Protocol for the state party.[443] None of the communications considered by the CRPD have been related to cases of access to water, nor have they been in connection to article 28 of the Convention on the right to social protection which explicitly refers to access to clean water.

3.4. Independent right to water in customary international law?

There is not yet an explicit recognition of the right to water in any of the international human rights conventions. Nevertheless, states are recognising the right to water in different ways. Therefore, this paper will next examine whether today the right to water is acknowledged as an independent right, according to customary international law.

Customary law requires the presence of two elements: state practice and *opinio juris.*[444] The latter element is the conviction that the practice is legally required,[445] or understood

[441] Optional Protocol to the Convention on the Rights of Persons with Disabilities (adopted on 13 December 2006, entered into force 3 May 2008) UN Doc. A/61/611.
[442] UN Committee on the Rights of Persons with Disabilities, *H.M v Sweden,* Communication 3/2011, 19 April 2012.
[443] UN Committee on the Rights of Persons with Disabilities, *Kenneth McAlpine v Ireland*, Communication 6/2011, 28 September 2012.
[444] Antonio Cassese *International Law* (2nd edn, OUP, Oxford 2005) 157; Ian Brownlie, *The Rule of Law in International Affairs, International Law at the Fiftieth Anniversary of the United Nations* (Martinus Nijhoff Publishers, The Hague 1998) 20; Malcolm N. Shaw, International Law (6th edn, CUP, Cambridge 2008) 74; Hugh Thirlway, 'The Source of International Law' in Malcolm D. Evans (ed), *International Law* (3rd edn, OUP, Oxford 2010) 102.

as a psychological element.[446] State practice is constituted by the repetition of certain state behaviour. It refers to what a state and its organs do regarding a specific matter. It refers for instance to state legislation, international and national judicial decisions, recitals in treaties and other international legal instruments, policy statements, press releases, the opinion of official legal advisers, comments by governments on drafts produced by the International Law Commission (ILC), and resolutions.[447] No particular duration of state practice is required to establish customary international law: some rules take a longer time to mature into practice, while others emerge very quickly such as rules regarding space.[448] Thirlway says that the settled practice required to establish a rule of customary law does not need to be the practice of every single state in the world, as long as it is widespread and consistent.[449]

In principle, customary law is applicable to all states,[450] whether or not they participated in the practice from which it sprang.[451] There are two possible exceptions to this rule: 1) special or local customary law; and 2) what is known as the persistent objector. [452] In the former case, a practice may mature into a binding rule, even if that practice is followed by a small number of states and even if that practice is counter to the customary law prevailing in other states. A special or local customary law must be recognised as binding by at least two states (it seems that two is the minimum number of states that is necessary to be subjected to a special custom).[453] In this case, the customary rule will be applicable only within a defined group of states.[454] The other exception, the persistent objector,[455] is effectuated when a rule is in the process of becoming a standard international practice, and a state clearly opposes the application of the rule. In this case when the rule becomes customary international law, it should not

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[445] Walter Kalin and Jorg Kunzli, *The Law of International Human Rights Protection* (OUP, Oxford 2009) 67.
[446] Alina Kaczorowska, *Public International Law* (4th edn Routledge,USA 2010) 35.
[447] Alina Kaczorowska, *Public International Law* (4th edn Routledge,USA 2010) 36.
[448] Ian Brownlie, *Principles of Public International Law* (7th edn OUP, Oxford 2008) 7.
[449] Hugh Thirlway, 'The Source of International Law' in Malcolm D. Evans (ed), *International Law* (3rd edn OUP, Oxford 2010) 105.
[450] Antonio Cassese, *International Law* (2nd edn OUP, Oxford 2005) 163. Hugh Thirlway, 'The Source of International Law' in Malcolm D. Evans (ed), *International Law* (3rd edn OUP, Oxford 2010) 106.
[451] Hugh Thirlway, 'The Source of International Law' in Malcolm D. Evans (ed), *International Law* (3rd edn OUP, Oxford 2010) 102.
[452] Hugh Thirlway, 'The Source of International Law' in Malcolm D. Evans (ed), *International Law* (3rd edn OUP, Oxford 2010) 106.
[453] Alina Kaczorowska, *Public International Law* (4th edn Routledge, USA 2010) 38. Hugh Thirlway, 'The Source of International Law' in Malcolm D. Evans (ed), *International Law* (3rd edn OUP, Oxford 2010) 107.
[454] Malcolm N. Shaw, *International Law* (6th edn, CUP, Cambridge 2008) 92; Hugh Thirlway, 'The Source of International Law' in Malcolm D. Evans (ed), *International Law* (3rd edn OUP, Oxford 2010) 106.
[455] The persistent objector is the state which continues to object to a new customary rule which is in the process of formation. Ian Brownlie, *The Rules of Law in International Affairs, International Law at the Fiftieth Anniversary of the United Nations* (Martinus Nijhoff Publishers, The Hague 1998) 25.

be applied to the objector state.[456] However, this theory is disputed, since there is little state practice and international case law to support the rule of the persistent objector.[457] For instance, Charney considers that the persistent objector rule, if it really exists, focuses more on the process of law development, the emergence of the new rule, than on the status of a state as objector under stable international law. He indicates that the two cases of the International Court of Justice that appear to support the persistent objector rule arise under circumstances in which the new rule itself was in substantial doubt. In fact, no case is cited for a circumstance in which the objector effectively maintained its status after the rule became well accepted in international law.[458] As Akehurst and Fitzmaurice pointed out the international community will exert pressure to force the objector to conform to the new rule. Therefore, few, if any, objectors will persevere to maintain their status long after the new norm becomes settled.[459]

Opinio juris is predicated on the fact that a general practice is accepted as obligatory and legally binding. It is a psychological requirement that consists of the consciousness of conformity to a rule.[460] For this element it is important to distinguish a practice based on motives of courtesy, fairness or morality, from a practice based on the sense of a legal obligation.[461] According to Cassese, *opinio juris* exists when states begin to believe that they must conform to the practice not only out of economic or political considerations, but because an international rule enjoins them to do so.[462] The difficulty of this element is its proof. According to Brownlie, the International Court of Justice is willing to assume the existence of an *opinio juris* on the basis of a general practice, consensus in literature, or previous determination of the Court or other international tribunals. However, it might be stricter in some cases.[463]

In what follows, state practice and *opinio juris* regarding the recognition of the right to water are discussed. There are a number of international soft law instruments that recognise the essential function of water to satisfy basic human needs and promote the

[456] Alina Kaczorowska, *Public International Law* (4th edn Routledge, USA 2010) 38; Hugh Thirlway, 'The Source of International Law' in Malcolm D. Evans (ed), *International Law* (3rd edn OUP, Oxford 2010)106.
[457] Antonio Cassese, *International Law* (2nd Edition, OUP, oxford 2005) 162; Hugh Thirlway, 'The Source of International Law' in Malcolm D. Evans (ed), *International Law* (3rd edn OUP, Oxford 2010) 108.
[458] Johathan I. Charney, 'The Development of Customary International Law', (1985) 56 (1) British Yearbook of International Law 21-22
[459] Fitzmaurice, 'The General Principles of Internatioanl Law Considered from the Standpoint of the Rules of Law, (1957) II Recueil de course 111 cited in Charney J., 'The Development of Customary International Law', (1985) 56 (1) British Yearbook of International Law 21 ; Akehurst, Custom as a Source of International Law', (1974) 5 British Yearbook of International Law 27 cited in Charney J., 'The Development of Customary International Law', (1985) 56 (1) British Yearbook of International Law 21
[460] Hugh Thirlway, 'The Source of International Law' in Malcolm D. Evans (ed), *International Law* (3rd edn OUP, Oxford 2010) 102.
[461] Ian Brownlie, *Principles of Public International Law* (7th edn OUP, Oxford 2008) 8.
[462] Antonio Cassese, *International Law* (2nd edn OUP, Oxford 2005) 157.
[463] Ian Brownlie, *Principles of Public International Law* (7th edn OUP, Oxford 2008) 8.

right to access to clean and sufficient water for all human beings without any kind of discrimination. Some of those documents are: the Mar del Plata Action Plan and Resolution II on 'Community Water Supply' of the UN Water Mar del Plata Conference in 1977;[464] the Marrakech Declaration of the first World Water Forum (1997);[465] principle 4 of the Dublin Statement (1992); Chapter 18 of Agenda 21 (1992); the Ministerial Declaration of The Hague on Water Security in the 21st Century of the Second World Water Forum (2000); the Millennium Development Goals (2002); the Plan of Implementation of the World Summit on Sustainable Development (2002); and the Ministerial Declaration 'Time for Solutions' of the sixth World Water Forum (2012)[466]. Hard law instruments, such as the Convention on the Elimination of All Form of Discrimination, the Convention on the Rights of the Child and the Convention on the Rights of Persons with disabilities, ratified by a large number of states, also explicitly refer to water as an essential element for the realisation of some particular human rights.

In addition, resolutions and recommendations of international organisations can also be considered as evidence of general practice and *opinio juris*. For example, resolutions of the UNGA have been used as evidence of customary international law.[467] Although they do not have any legal force, resolutions of the UNGA are convenient material source of law, inasmuch as they state propositions of general law very often assented by a very large number of states.[468] The vote of a state on a matter before an international organisation is in itself an act of the state. The voting of a large number of states on a specific question may illustrate a consensus or disagreement regarding that matter.[469] As a result, the following resolutions should also be taken into account as evidence of customary international law: the UNGA Resolution 54/175 on the right to development, which affirms that the right to water is a fundamental right and that its promotion constitutes a moral imperative for both national governments and the international community;[470] the UNGA Resolution 64/292, which recognises the right to safe and clean drinking water as a human right;[471] and the UNGA Resolution 66/288, which endorses the outcome document of the UN Conference on Sustainable Development (Rio+20) entitled 'The future we want', in which governments reaffirm their

[464] UN Water Conference, "Report of the UN Water Conference, Mar del Plata 14-25 March 1997," (1997) E/CONF.70/29, 66-68.
[465] World Water Council, Marrakech Declaration (adopted on 22 March 1997, at the First World Water Forum).
[466] World Water Council, Ministerial Declaration 'Time for Solutions' (adopted 13 March 2012 at the sixth World Water Forum).
[467] Hugh Thirlway, 'The Source of International Law', in Malcolm D. Evans (ed), *International Law* (3rd edn, OUP, Oxford 2010) 104; Mark W. Janis, *An introduction to international law* (4th edn Aspen publishers, 2003) 51.
[468] Hugh Thirlway, 'The Source of International Law' in Malcolm D. Evans (ed), *International Law* (3rd edn OUP, Oxford 2010) 117.
[469] Mark W. Janis, *An introduction to international law* (4th edn Aspen publishers, 2003) 51
[470] UNGA Resolution 54/175 (1999) Un Doc. A/Res/54/175, para 12(a).
[471] UNGA Resolution 64/292 (2010) UN Doc A/Res/64/292.

commitment to the progressive realisation of the human right to safe drinking water and sanitation.[472]

These resolutions are evidence of the consensus on the recognition of the right to water. However, the approach used by states to acknowledge this right may differ among them. In this particular case, while some states consider the right to water as a new or independent right, other states favour the recognition of this right as a derivative right or an essential element of other human rights explicitly enshrined in international human rights conventions. Thus, the individual statement made by a state when adopting these resolutions is important to understanding the manner in which that state recognises the right to water. Some of the countries that voted in favour of UNGA Resolution 64/292, which recognises the right to safe and clean water as a human right, explicitly indicated that they consider this right to be a derivative right or a component of other human rights, or that this recognition does not create a new right. Mostly for those countries the right to water is considered to derive from the right to an adequate standard of living, the right to health or the right to life. The countries that made such statements are: Germany, Spain, Hungary, Norway, Egypt, Liechtenstein, Brazil, Costa Rica and the United Kingdom. The latter does not believe that there exists sufficient legal basis under international law to either declare or recognise water and sanitation as an independent human right.[473] Colombia stated its view that the intent of the resolution was to recognise the right to water and sanitation as a right derived from or viewed in connection with other rights. According to Colombia, the definition given to the right to water in this Resolution emphasises its nature as an essential component of the right to life and other rights.[474] Mexico too recognised that the right to water derived from other rights.[475] Nevertheless, it seems that its position evolved since Mexico recently incorporated in its constitution the human right to water as an independent right.

On the other hand, other states acknowledged the human right to water as an independent right. This is the case for Bolivia, which indicated that the rights to safe drinking water and sanitation are independent rights which must be recognised as such. France welcomed the progress made through the adoption of this text, with its recognition that the right to access to drinking water and sanitation is a universal right. Belgium recognised the fundamental right to access to water, which is enshrined in its national and regional legislation. The Netherlands affirmed that access to clean affordable drinking water and adequate sanitation was recognised as a human right in 2008. The Netherlands also firmly believes that the right to access to clean, affordable drinking water and good sanitation should be recognised as such. Cuba states that access to water and sanitation is a fundamental human right. Palestine affirmed that the

[472] UNGA Resolution 66/288 (27 July 2012) UN Doc A/RES/66/288, paras 120-121.
[473] UNGA '18th Plenary meeting' (28 July 2010) UN Doc A/64/PV.108.
[474] UNGA '18th Plenary meeting' (28 July 2010) UN Doc A/64/PV.108, 14.
[475] UNGA '18th Plenary meeting' (28 July 2010) UN Doc A/64/PV.108, 14.

right to safe and clean drinking water and sanitation is a universal human right that is essential to the full enjoyment of the right to life and human dignity.[476]

Australia abstained in its vote because it has reservations about the process for declaring a new human right through a General Assembly resolution. It also stated that when recognising a new human right consensus is very important.[477]

Moreover, as part of state practice, the national recognition of the right to water must also be taken into account in order to create customary international law. A number of countries have recognised within their domestic legal order, through their national constitutions, legislation and jurisprudence, the right to water as an independent right. States that have incorporated the right to water within their constitutions are: Bolivia[478], Democratic Republic of the Congo[479], Ecuador[480], Ethiopia[481], Gambia[482], Kenya[483], Maldives[484], Mexico[485], Uruguay[486], Somalia[487], South Africa[488], and Zambia[489].

[476] UNGA '18th Plenary meeting' (28 July 2010) UN Doc A/64/PV.108.
[477] UNGA '18th Plenary meeting' (28 July 2010) UN Doc A/64/PV.108, 11.
[478] Constitución de la República de Bolivia. Articulo 16. "Toda persona tiene derecho al agua y a la alimentación". Articulo 20. "Toda persona tiene derecho al acceso universal y equitativo a los servicios básicos de agua potable, alcantarillado, electricidad, gas domiciliario, postal y telecomunicaciones". The Constitution was last amended in 2009.
[479] Constitution de la République démocratique du Congo. Article 48. "Le droit à un logement décent, le droit d'accès à l'eau potable et à l'énergie électrique sont garantis. La loi fixe les modalités d'exercice de ces droits".
[480] Constitución del Ecuador, 2008. Articulo 2. "Son deberes primordiales del Estado: 1. Garantizar sin discriminación alguna el efectivo goce de los derechos establecidos en la Constitución y en los instrumentos internacionales, en particular la educación, la salud, la alimentación, la seguridad social y el agua para sus habitantes". Articulo 12. "El derecho humano al agua es fundamental e irrenunciable. El agua constituye patrimonio nacional estratégico de uso público, inalienable, imprescriptible, inembargable y esencial para la vida".
[481] Constitution of the Federal Democratic Republic of Ethiopia. Article 90.1 "To the extent the country's resources permit, policies shall aim to provide all Ethiopians access to public health and education, clean water, housing, food and social security".
[482] Constitution of the Republic of Gambia, 1997. Section 216 (4) "The State shall endeavour to facilitate equal access to clean and safe water, adequate health and medical services, habitable shelter, sufficient food and security to all persons".
[483] Constitution of Kenya, last amended 2010. Article 42.1 Everyone has the right (d) to clean and safe water in adequate quantities.
[484] Constitution of the Republic of Maldives, 2008. Article 23. Economic and social rights. "The Estate undertakes to achieve the progressive realization of these rights by reasonable measures within its ability and resources: (a) adequate and nutritious food and clean water". (Translated into English by Ms. Dheena Hussain at the request of the Ministry of Legal Reform, Information and Arts). <http://www.maldivesinfo.gov.mv/home/upload/downloads/Compilation.pdf > accessed 15 November 2012.
[485] Constitución Política de los Estados Unidos Mexicanos. Articulo 4. Parágrafo 6. "Toda persona tiene derecho al acceso, disposición y saneamiento de agua para consumo personal y domestico en forma suficiente, salubre, aceptable y asequible. El Estado garantizara este derecho y la ley definiera las bases, apoyos y modalidades para el acceso y uso equitativo y sustentable de los recursos hídricos, estableciendo la participación de la Federación, las entidades federativas y los municipios, así como la participación de la ciudadanía para la consecución de dichos fines". (Paragraph approved on 29 September 2011, and incorporated through a Decree published on the official Journal on 8 February 2012).

Although Spain has not recognised the right to water in its national constitution, two of its autonomous regions, Valencia[490] and Aragon[491] have done so, owing to the fact that the autonomous regions have legislative powers and substantial authority in the areas of environment, water and local government.[492] Countries that recognise the right to water as a fundamental right in their national legislation or national water law include Belgium[493], France[494], Indonesia[495], Israel[496], Paraguay[497], Peru[498], Tanzania[499], and

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[486] Constitución Política de la Republica de Uruguay. Articulo 47. "El agua es un recurso natural esencial para la vida. El acceso al agua potable y el acceso al saneamiento, constituyen derechos humanos fundamentales". The Constitution was last amended on 31 October 2004.

[487] Provisional Constitution of the Federal Republic of Somalia, Article 27, Economic and Social Rights. 1) Every person has the right to clean potable water. The Constitution was adopted on 1 August 2012.

[488] Constitution of the Republic of South Africa, Act No 108 of 1996. Section 27. Health care, food, water and social security. 1. Everyone has the right to have access to: "(b) sufficient food and water".

[489] Constitution of Zambia (as amended by Act No. 18 of 1996). Article 112. The State shall be based on democratic principles: "(d) the State shall endeavour to provide clean and safe water, adequate medical and health facilities and decent shelter for all persons, and take measure to constantly improve such facilities and amenities".

[490] Ley Orgánica 5/1982, de 1 de Julio, Estatuto de Autonomía de la Comunitat Valenciana, articulo 17. "1. Se garantiza el derecho de los valencianos y valencianas a disponer del abastecimiento suficiente de agua de calidad. Igualmente se reconoce el derecho de redistribución de los sobrantes de aguas de cuencas excedentarias atendiendo a criterios de sostenibilidad de acuerdo con la Constitución y la legislación estatal.

Los ciudadanos y ciudadanas valencianos tiene derecho a gozar de una cantidad de agua de calidad, suficiente y segura, para atender a sus necesidades de consumo humano y para poder desarrollar sus actividades económicas y sociales de acuerdo con la ley".

[491] Ley Orgánica 5/2007, de 20 abril, de reforma del Estatuto de Autonomía de Aragón, articulo 19. Derechos en relación con el agua. "1. Los aragoneses, en el marco del desarrollo sostenible, de la participación y de la utilización eficaz y eficiente del recurso, tienen derecho a disponer del abastecimiento de agua en condiciones de cantidad y calidad suficientes para atender sus necesidades presentes y futuras, tanto para el consume humano como para el desarrollo de actividades sociales y económicas que permitan la vertebración y el reequilibrio territorial de Aragón".

[492] Antonio Embid Irujo, "Implementation of the Human Right to Water in Spain" in Henri Smets (ed), *The Right to safe Drinking water and sanitation in Europe* (Académie de l'eau, Editions Johanet, Paris 2011) 152.

[493] Belgium is divided in regions, each one of which has recognised the right to water within their own legislative framework. In the region of Wallonia it is the Décret relative au cycle de l'eau et instituant une Société public de gestion de l'eau (Moniteur Belge du 22/06/1999, p. 23579), Article 1 §2 "Toute personne a le droit de disposer d'une eau potable de qualité et en quantité suffisante pour son alimentation, ses besoins domestiques et sa santé". The Region of Brussels adopted on 8 September 1994 an Ordonnantie tot regeling van de drinkinwatervoorziening vie het waterleidingnet in the Brussels Hoofdstedelijk Gewest, Artikel 2 "Deze ordonnantie is van toepassing op de drinkwatervoorziening als openbare dienst in het Brussels Gewest. Zij waarborgt voor iedere natuurlijke persoon die verblijft in een voor bewoning bestemd gebouw waarvoor een aansluiting tot stand is gebracht, het recht op drinkwatervoorziening voor huishoudelijk gebruik". The Flemish region adopted on 20 December 1996 a Decreet houdende bepalingen tot begeleiding van de begroting 1997, Artikel 34 §3. "De gemeenten, gemeentelijke regies, intercommunales en alle andere maatschappijen die instaan voor een openbare watervoorziening zijn er toe gehouden aan elk van de op hun openbaar waterleidingnet aangesloten huishoudelijke abonnees met ingang van 1 januari 1997 jaarlijks een hoeveelheid leidingwater gratis te leveren gelijk aan 15 m3 per persoon die op 1 januari van het beschouwde jaar gedomicilieerd is op het adres van de aansluiting op het openbare waterleidingnet.

De Vlaamse regering kan nadere regels vaststellen met betrekking tot de voormelde gratis levering van leidingwater aan huishoudelijke abonnees". Likewise, in the last years there have been a number of proposals to amend the Constitution in order to include the universal right to water. At present a new proposal is under revision in the parliament. See

Venezuela[500]. Additionally, the jurisprudence of the judicial courts of Colombia[501] and Peru recognise the right to water as a non-enumerated fundamental right that needs to be

<http://www.dekamer.be/kvvcr/showpage.cfm?section=flwb&language=nl&rightmenu=right&cfm=/site/wwwcfm/flwb/flwbn.cfm?legislat=53&dossierID=0230&inst=S> and <http://www.dekamer.be/kvvcr/showpage.cfm?section=/flwb&language=nl&rightmenu=right&cfm=/site/wwwcfm/flwb/flwbn.cfm?lang=N&legislat=53&dossierID=0229> accessed 11 June 2013.

[494] In France, the most relevant provision concerning the human right to water was introduced by legislation, Law 2006-1772 of 30 December 2006 on Water and Aquatic Environments, it establishes that the use of water belongs to all and every person, for food and hygiene, everyone has the right to access to safe drinking water under economic acceptable conditions to all. Loi n° 2006-1772 du 30 décembre 2006 sur l'eau et les milieux aquatiques, article 1. "L'eau fait partie du patrimoine commun de la nation. Sa protection, sa mise en valeur et le développement de la ressource utilisable, dans le respect des équilibres naturels, sont d'intérêt général.
Dans le cadre des lois et règlements ainsi que des droits antérieurement établis, l'usage de l'eau appartient à tous et chaque personne physique, pour son alimentation et son hygiène, a le droit d'accéder à l'eau potable dans des conditions économiquement acceptables par tous.
Les coûts liés à l'utilisation de l'eau, y compris les coûts pour l'environnement et les ressources elles-mêmes, sont supportés par les utilisateurs en tenant compte des conséquences sociales, environnementales et économiques ainsi que des conditions géographiques et climatiques".

[495] Law 7 of 2004 (adopted on 18 March 2004), Article 5 "The State guarantees everyone's rights to obtain water for their minimum daily basic needs in order to achieve a healthy, clean, and productive life", <http://www.fao.org/fishery/shared/faolextrans.jsp?xp_FAOLEX=LEX-FAOC048775&xp_faoLexLang=E&xp_lang=en> accessed 7 June 2013.

[496] Water Law, 5719-1959, Section 3 The individual's right to water. "Any individual is entitled to receive water and to use it, in accordance with the provisions of this law". Translation made by the Ministry of Environmental protection of Israel, <http://old.sviva.gov.il/Enviroment/Static/Binaries/Articals/Water_Law_1959.excerpts_1.pdf> accessed 28 May 2013.

[497] Ley 3239 de 2007 (adopted on 10 July 2007), Articulo 3 "La gestión integral y sustentable de los recursos hídricos del Paraguay se regirá por los siguientes principios:
b) El acceso al agua para la satisfacción de las necesidades básicas es un derecho humano y debe ser garantizado por el estado, en cantidad y calidad adecuada"

[498] Ley 29338(adopted on 30 March 2009, published 31 March 2009), Articulo III "Los principios que rigen el uso y gestión integrada de los recursos hídricos son:
2. Principio de Prioridad en el acceso al agua. El acceso al agua para la satisfacción de las necesidades primarias de la persona humana es prioritario por ser un derecho fundamental sobre cualquier uso, inclusive en épocas de escasez".

[499] The Water Resource Management Act 2009, Section 4 "(1) The objective of this Act is to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways which take into account the following fundamental principles, including-
(b) promoting equitable access to water and the principle that water is essential for life and that safe drinking water is a basic human right". Gazette of the United Republic of Tanzania No. 20 Vol. 90 dated 15 May 2009.

[500] Ley de Aguas. Articulo 5. "Los principios que rigen la gestión integral de las aguas se enmarcan en el reconocimiento y ratificación de la soberanía plena que ejerce la Republica sobre las aguas y son: 1. El acceso al agua es un derecho humano fundamental". Gaceta Oficial de la Republica Bolivariana de Venezuela No 38.595, 2 January 2007.

[501] The Colombian Constitutional Court has indicated in its jurisprudence that water constitute a truly fundamental right when it is used for human consumption. It also indicates that at the international level the right to water is considered an economic and social right derived from article 11 and 12 of the ICESCR, that it is part of the rights to women to enjoy an adequate standard of life and the right of children to combat sickness and malnutrition. Colombian Constitutional Court, Tutela, T-616 of 2010.

guaranteed. The jurisprudence of the Peruvian Constitutional Tribunal[502] explicitly recognises the right to water as an independent right.

In addition, the following states have acknowledged the existence of the human right to water, but as a right that derives from other human rights: Finland, Germany, Italy, Norway, Portugal, Spain, Sweden, Switzerland, Ukraine, and the United Kingdom.[503] It is worth mentioning that at the level of the European Union, the EU High Representative, Catherine Ashton stated on World Water Day in 2010 that '*the European Union reaffirms that all states bear human rights obligations regarding access to safe drinking water, which must be available, physically accessible, affordable and acceptable*'.[504] She also expressed that '*even more than being related to individual rights, access to safe drinking water is a component element of the right to an adequate standard of living and is closely related to human dignity'*.[505] India has also interpreted through judicial decisions that the human right to water is derived from the right to life.[506]

Furthermore, the Berlin Rules adopted by the ILA in 2004 as well as the UN Watercourse Conventions (1997)[507] indicate that when determining an equitable and reasonable utilisation of international watercourses, water to satisfy vital human needs must receive priority. According to the Berlin Rules different kinds of water uses have no inherent preference in international water law, except when water is used for vital human needs.[508] The Berlin Rules also recognise that every individual has a right to access to sufficient, safe, acceptable, physically accessible and affordable water to meet individual's vital human needs[509]. Additionally, the Protocol on Water and Health (1999) to the Convention on the Protection and Use of Transboundary Watercourse and

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[502] Peruvian Constitutional Tribunal, Exp No 6546-2006-PA/TC, *Cesar Augusto Zuñiga Lopez v. Lambayeque*, Lima, 7 November 2007. See also Peruvian Constitutional Tribunal. Exp No 01985-2011-PA-TC, *Eduardo Antonio Malca Vasquez v. Cajamarca*, Lima, 22 Septembre 2011.

[503] Henri Smets (ed), *The Right to safe Drinking water and sanitation in Europe* (Académie de l'eau, Editions Johanet, Paris 2011) 103, 104, 123, 124, 148, 155, 156, 159, 200, 201, 202, 218 and 220; Marleen van Rijswick and Andrea Keessen, 'Legal Protection of the Right to Water in the European Union' in Farhana Sultana and Alex Loftus (eds), *The Right to Water: Politics, Governance and Social Struggles* (Earthscan, New York 2011) 137.

[504] Council of the European Union, 'Declaration by the High Representative, Catherine Ashton, on behalf of the EU to commemorate the World Water Day, 22nd March' (2010) 7810/10 (Presse 72) P 12/10 <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/cfsp/113472.pdf> accessed 8 December 2012.

[505] Council of the European Union, 'Declaration by the High Representative, Catherine Ashton, on behalf of the EU to commemorate the World Water Day, 22nd March' (2010) 7810/10 (Presse 72) P 12/10 <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/cfsp/113472.pdf> accessed 8 December 2012.

[506] Vrinda Narain, 'Water as a fundamental Right: A Perspective from India' (2010) 34 (4) Vermont Law Review 919-922. Perumatty Grama Panchayat v State of Kerala, India W.P (c) No. 34292 of 2003, 16 December 2003. <http://www.elaw.org/node/1410> accessed 20 September 2012.

[507] UN Watercourse Convention, Article 10.

[508] Berlin Rules, Article 14

[509] Berlin Rules, Article 17. The right of access to water..

International Lakes requires state parties to pursue access to drinking water for everyone.[510]

Since the human right to water is a new right that started to emerge in the last four decades, it is also important to examine whether, during its development process, certain states have persistently rejected its recognition. The voting of the adoption of the UNGA Resolution 64/292, which recognises the human right to water, can be relevant to determine whether a state is persistently objecting this right. As a matter of fact, no single state voted against the adoption of the Resolution. Moreover, states that abstained in the voting stated that the adoption of the Resolution undermined the formal process underway by the Human Rights Council for developing a well-formulated human right to water.[511] Contrary to objecting the recognition of the right to water, some of the abstaining countries stated that they recognise this right at the national level, in most cases as a derivative right. Differences on the adoption of the human right to water are related to its legal scope and application, but these differences do not hinder or deny the recognition of this right.[512] At the international level there is no apparent evidence of the existence of a persistent objector to the recognition of the human right to water. As Tully put it '[g]overnments have not expressed opposition to a human rights orientation but their reactions have proven lukewarm'.[513]

Based on the aforementioned state practice and *opinion juris* there is now enough evidence to conclude that the human right to water is unmistakably recognised at the international level. Nevertheless, there is no consensus regarding the manner in which this right is recognised. For instance, while some states and UN treaty bodies (HRCom, CEDAW and CRPD) recognise the right to water as a an extension or an essential component of other rights embraced in international human rights conventions, other states and the CESCR recognise the right to water as an independent right. Although the number of states that explicitly recognise the independent human right to water might still be small in number, they form part of a relevant and growing practice.[514] For now, it seems that the right to water has a dual character: as a derivative and as an independent right.

[510] Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourse and International Lakes, Art. 6(1). Targets and target dates.
[511] UNGA '18th Plenary meeting' (28 July 2010) UN Doc A/64/PV.108, see position of United States of America, Turkey, Botswana, United Kingdom, Japan, Canada, Ethiopia, and the Netherlands.
[512] Laurence Boisson de Chazournes, *Fresh Water in International Law* (OXP, Oxford, 2013) 152.
[513] Stephen Tully, 'A Human Right to Access Water? A Critique of General Comment No. 15', (2005) 23 (1) Netherlands Quarterly of Human rights 44.
[514] Laurence Boisson de Chazournes, Freshwater in International Law (OUP, Oxford 2013) 155.

3.5. Conclusions

Due to the absence of an explicit incorporation of the right to water in any of the existing international human rights conventions, and due to the vital character of drinking water, it has been debated whether such a right exists and how it has been recognised.

The first international human rights conventions that were adopted under the auspices of the UN (ICCPR and ICESCR) do not include any reference to water, mainly because during the drafting of those instruments there was not yet an international concern about the lack of access to drinking water to satisfy basic human needs. It was around the 1970's that this problem started to be discussed. Thus, it is no coincidence that subsequent international human rights conventions incorporated references to drinking water in connection with those rights for which water plays an essential role.

In recent years, there has been an evolution by which both states and UN treaty bodies have started to become aware of the close connection between safe drinking water and the realisation of certain human. This development is also evident in General Comments of the UN treaty bodies. For instance, the CESCR and the CRC have indicated in their General Comments the essential role of water for the realisation of the right to health. The CESCR declared that access to drinking water is a relevant factor necessary for the right to adequate housing. More recently, the CESCR has interpreted article 11 of the ICESCR as implicitly incorporating the human right to water. States, too, have acknowledged the essential function of drinking water for the implementation of a number of human rights, as evidenced by their reports to UN oversight bodies. Similarly, the respective UN committees have expressed concerns and made recommendations regarding instances of lack of access to drinking water, or unsafe drinking water, since these circumstances negatively affect certain human rights. The most recurrent rights that are inextricably connected with access to safe drinking water are the right to life, the prohibition on torture and ill-treatment, the right to health, and the right to an adequate standard of living. Based on the (quasi)jurisprudence of the HRCom, it can be concluded that the right to water is considered to be implicit in different rights enshrined in the ICCPR, such as the right of persons deprived of their liberty (article 10) and the prohibition on torture and ill-treatment (article 7). The CEDAW and the CRPD have not yet received individual complaints for lack of access to water, or alleging a violation of the provisions of the Conventions that explicitly refer to drinking water. Due to the recent entry into force of the OP-ICECSR, the CESCR, which is the body proposing the recognition of the human right to water as an independent right, has not yet received or examined an individual complaint alleging lack of access to water.

Taking into account state practice and *opinio juris*, there is no doubt about the international recognition of the human right to water. However, its acknowledgment differs among countries and UN treaty bodies, due to the fact that this right has not been explicitly incorporated in any international convention on human rights as an

independent right. On the one hand, access to drinking water is considered to derive from other rights, due to its incorporation in some international treaties as a component of other human rights. On the other hand, the CESCR has interpreted that the ICESCR implicitly incorporates the right to water as an independent right. Following this path different states, particularly developing countries located in Africa and Latin America, now recognise the independent right to water. Hence, the human right to water is recognised in two different ways: 1) as a derivative right, emanating from different human rights, whether civil and political, economic and social or collective rights; and 2) as a separate, independent right.

To avoid this diverse recognition of the right to water, which could lead to ineffective and inconsistent implementation, particularly when subsumed in other human rights, it would be best if the right to water is recognised as an independent right, as proposed by the CESCR. The right to water would thus contribute to the enjoyment of all other rights for which water is a prerequisite, such as the right to life, the right to health, the prohibition on cruel or inhumane treatment, the right to housing and the right to an adequate standard of living. Furthermore, this independent recognition would give more clarity and consistency to the content of this right, as well as to state obligations resulting from this right.

CHAPTER IV

4. ACKNOWLEDGMENT OF THE HUMAN RIGHT TO WATER AT THE REGIONAL LEVEL

4.1. Introduction

Human rights are also being protected at the regional level where the political and cultural local circumstances are taken into account. Regional intergovernmental systems play a major role and are important to an understanding of the full range of techniques available for protecting and promoting human rights.[515]

Currently, there are three well established and two embryonic regional systems with the purpose of promoting and protecting human rights. The well established regional human rights systems are: the European, the Inter-American and the African system, which were created by the Council of Europe, the Organisation of American States and the African Union, respectively. The two embryonic systems are being developed in the Asian and Arab regions.

One of the embryonic systems of human rights is being developed by the Association of Southeast Asian Nations (hereinafter ASEAN)[516]. This Association created the ASEAN Intergovernmental Commission on Human Rights that was charged to develop a human rights declaration.[517] On 18 November 2012, the Association adopted the ASEAN Human Rights Declaration. Among the economic, social and cultural rights incorporated in this Declaration, the right to safe drinking water and sanitation has been explicitly included as part of a list of other rights that conform the right to an adequate standard of living.[518] The ASEAN Intergovernmental Commission on Human Rights is

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[515] Philip Alston and Ryan Goodman, *International Human Rights The Socessor to International Human Rights in Context:Law, Politics and Morals* (OUP, Oxford 2013) 889.

[516] The Association of Southeast Asian Nations (ASEAN) was established on 8 August 1967 in Bangkok, Thailand, with the signing of the ASEA Declaration. Today, this Association is composed of ten States: Indonesia, Malaysia, Philippines, Singapore, Thailand, Brunei Darussalam, Vietnam, Lao People's Democratic Republic, Myanmar and Cambodia. To transform the informal regional organization into a more rules-based institution the ASEAN Charter was signed in 20 November 2007. According to the Charter (article 14) ASEAN shall establish a human rights body. Therefore, on 23 October 2009 the ASEAN Intergovernmental Commission on Human Rights (AICHR) was established. Tan Hsien-Li, *The ASEAN Intergovernmental Commission on Human Rights: Institutionalising Human Rights in Southeast Asia* (CUP, Cambridge 2011) 4 and 141. See also the official website of the Association of the Southeast Asian Nations, <http://www.aseansec.org/about_ASEAN.html> accessed 20 December 2012.

[517] ASEAN Intergovernmental Commission on Human Rights Terms of Reference (adopted on October 2009) <http://www.asean.org/images/archive/publications/TOR-of-AICHR.pdf> accessed 12 June 2013.

[518] ASEAN Human Rights Declaration, Article 28. "Every person has the right to an adequate standard of living for himself or herself and his of her family including:
a) The right to adequate and affordable food, freedom from hunger and access to safe and nutritious food;
b) The right to clothing;
c) The right to adequate and affordable housing
d) The right to medical care and necessary social services
e) The right to safe drinking water and sanitation;

responsible for the promotion and protection of human rights in the region. However, this Intergovernmental Commission is only a consultative body, which can provide advisory services and technical assistance on human rights matters.[519] In other words this body has not been entrusted with any responsibility so as to consider complaints regarding violations of human rights.

The other evolving regional system was created under the auspices of the League of Arab States.[520] In 1994 this organisation adopted a Charter on Human Rights; however this Charter never entered into force. Then, as part of an effort to 'modernise this organisation, the Charter was revised.[521] In 2004, the League of Arab States adopted the Arab Charter on Human Rights[522], which entered into force on 15 March 2008. By the end of 2013 this Charter was ratified by fourteen states.[523] The Arab Charter has been criticised, inter alia, because it does not adopt an effective enforcement mechanism, since it lacks individual or state communications or complaint mechanisms. The Charter established an Arab Human Rights Committee, which main task is to focus on monitoring implementation based on states reports and to issue comments and recommendations.[524] The Arab Charter explicitly includes access to safe drinking water as an essential element of the right to health.[525]

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f)The right to a safe, clean and sustainable environment".

[519] ASEAN Intergovernmental Commission on Human Rights Terms of Reference (adopted on October 2009) <http://www.asean.org/images/archive/publications/TOR-of-AICHR.pdf> accessed 12 June 2013.

[520] The Arab League was founded in 1945, and today is composed of: Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, State of Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates and Yemen.

[521] Mervat Rishmawi, 'The Arab Charter on Human Rights and the League of Arab State: An Update', (2010) 10 Human Rights Law Review 170.

[522] Arab Charter on Human Rights, (revised version adopted on 22 May 2004, entered into force on 15 March 2008).

[523] Algeria, Bahrain, the United Arab Emirates, Jordan, Libya, Palestine, Yemen, Qatar, Saudi Arabia, Syria, Sudan, Kuwait, Lebanon, and Iraq. See the official website of the League of Arab States, <http://www.lasportal.org/wps/portal/las_ar_humanrights/inpage/!ut/p/c5/vY7LDoIwEEW_xQ8w0xJC4xIVsLwULAjdEEyMgfJKMAp8veAe3RDnLm_unAMcxlTpM7unj6yu0gIi4EqCsM8Cy8DIkPdbRIlnSUpIHWRKYx_P90z-sb5AhOTknPcNHcTg56gzmcBHlgcvRxOI5eHJtX3ain44a3XnMjq0xKcO0y3cbnCoe5p6sohjixWYwO9FfZ2cd-Nj_g09iX36mVMRxMDJ7N4lwBZU_8rS5T-ylEVZ7qEub9CUwbPc0HX6ibp6AyuMZJU!/dl3/d3/L2dBISEvZ0FBIS9nQSEh/?pcid=dcecce004a3e7a18b9f8bd526698d42c> accessed 16 October 2013.

[524] Mervat Rishmawi, 'The Revised Arab Charter on Human Rights: A Step Forward?' (2005) 5 Human Rights Law Review 365; Mervat Rishmawi, 'The Arab Charter on Human Rights and the League of Arab State: An Update', (2010) 10 Human Rights Law Review 174; Mohammed Amin Al-Midani and Mathilde Cabanetter, 'Arab Charter on Human Rights 2004', (2006) 24 Boston University International Law Journal 149,161 <http://www.acihl.org/res/Arab_Charter_on_Human_Rights_2004.pdf> accessed 8 May 2013.

[525] Arab Charter on Human Rights, Article 39. "1. The States parties recognised the right of every member of society to the enjoyment of the highest attainable standard of physical and mental health and the right of the citizens to free basic health-care services and to have access to medical facilities without discrimination of any kind.
2. The measures taken by States parties shall include the following:

This chapter examines the recognition of the human right to water at the regional level. Since the ASEAN and the Arab human rights systems are still evolving, and do not offer effective enforcement mechanisms, we will focus on the other three regional human rights systems that are already enforcing the protection of human rights: the European, the African and the Inter-American systems. This chapter analyses whether the human right to water has been acknowledged at the regional level and if so, whether this right has been recognised as a derivative or independent right. Next to that, the implementation of the various regional instruments will be studied. With this purpose in mind the different regional conventions and the decisions of the respective bodies charged with the responsibility to ensure compliance by state parties will be scrutinised. Since the United Nations Economic Commission for Europe (UNECE) adopted a regional convention on water management, and due to the fact that one of the main purposes of the UN is to achieve international cooperation in promoting and encouraging respect for human rights, this chapter also examines whether the human right to water has been taken into account in such a convention.

4.2. European human rights system and UNECE

This section focuses on examining whether the human right to water has been recognised and it is implemented at the European level. Having this purpose in mind, two pan-European organisations will be examined. The first one is the Council of Europe, which established the European human rights system. The second one is the UNECE. The latter has been included mainly because the UNECE contributes to enhancing the United Nation's objectives through the regional implementation of outcomes of global conferences and summits.[526] One of the outcomes, as examined in the previous chapter, has been the importance of recognising access to water as a human right. Therefore, it is considered relevant to analyse whether the work of the UNECE may have also contributed to the recognition and implementation of the right to water.

The European human rights system was adopted by the Council of Europe[527], founded on 5 May 1949. Today, 47[528] European countries are members of the Council of Europe.

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a) Development of basic health-care services and the guaranteeing of free and easy access to the centres that provide these services, regardless of geographical location or economic status;
b) Efforts to control disease by means of prevention and cure in order to reduce the mortality rate;
c) Promotion of health awareness and health education;
d) Suppression of traditional practices which are harmful to the health of the individual;
e) Provision of basic nutrition and safe drinking water for all;
f) Combating environmental pollution and providing proper sanitation systems;
g) Combating drugs, psychotropic substances, smoking and substances that are damaging to health.

[526] United Nations Economic Commission for Europe, 'Mission', >http://www.unece.org/termsofreferenceandrulesofprocedureoftheunece.html> accessed 15 June 2013.

[527] Council of Europe, 'Who are we?' <http://www.coe.int/aboutCoe/index.asp?page=quisommesnous&l=en> accessed 15 December 2012.

The European human rights system was set up to promote democracy and protect human rights in Europe. With this purpose the European Court of Human Rights (hereinafter the ECtHR) was created. With the coming into force of Protocol 11, on 1 November 1998, a single permanent and full time court was established, so that the former Court and Commission ceased to exist.[529] The ECtHR can receive individual petitions and interstate complaints.[530] The ECtHR allows states a degree of leeway, according to the doctrine of the 'margin of appreciation', which means that the Court will not interfere in certain domestic spheres while retaining an overall supervision. The margin of appreciation will vary depending upon the content of the right in question.[531]

The final judgments of the ECtHR shall be transmitted to the Committee of Ministers, which is responsible for supervising their execution.[532] The Committee of Ministers is a political body, and the executive organ of the Council of Europe. It consists of the Foreign Ministers, or their Deputies, of all member states.[533]

4.2.1. Recognition of the right to water at the European level in regional declarations, statements, resolutions and action plans

This section examines whether the Council of Europe and the UNECE have recognised the human right to water through statements, declarations, resolutions, action plans and conventions. In order to do so, each one of the organisations will be analysed independently.

4.2.1.1. Council of Europe

For already a long time the Council of Europe has been aware of the importance of water for human activities and nature, as well as the increasing deterioration of water resources due to modern civilisation. Therefore, the Committee of Ministers of the Council of Europe adopted on 26 May 1967 Resolution (67)10 on the European Water Charter to promote water conservation in Europe. This Resolution acknowledged the essential role that water plays for humans. The Resolution stated that *'[t]here is no life*

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[528] Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxemburg, Malta, Moldova, Monaco, Montenegro, The Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Macedonia, Turkey Ukraine, and United Kingdom. See Council of Europe, <http://www.coe.int/aboutCoe/index.asp?page=47pays1europe&l=en> accessed 21 September 2012.

[529] Malcolm N. Shaw, *International Law* (6th edn, CUP, Cambridge 2008) 351.

[530] Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby (adopted 11 may 1994, entered into force 1 November 1998), articles 33, 34.

[531] Malcolm N. Shaw, *International Law* (6th edn, CUP, Cambridge 2008) 356.

[532] Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, Article 46.

[533] Malcolm N. Shaw, *International Law* (6th edn, CUP, Cambridge 2008) 359.

without water. It is a treasure indispensable to all human activity'.[534] It also indicated that water is the first need of man, and that man depends on it for drinking, food supplies and washing. With this Resolution, the Committee of Ministers invited European states to protect water from pollution, since *'[p]ollution is a change, generally man-made, in the quality of water which makes it unusable or dangerous for human consumption, industry, agriculture, fishing, recreation, domestic animals and wildlife*'.[535]

This Resolution recognised the importance of having access to clean water for human consumption. In the following years the growing concern about water pollution led to the review and updating of the European Water Charter at the end of the 1990s. As a result, the Committee of Ministers adopted on 17 October 2001 Recommendation Rec(2001)14 on the European Charter on Water Resources, which replaced the European Water Charter.

The new Charter goes further than accepting the crucial relationship that humans have with water resources. It acknowledges that water is a human right that is incorporated in two fundamental rights recognised in international human rights conventions, the right to be free from hunger and the right to an adequate standard of living (article 25 of the UDHR and article 11 of the ICESCR).[536] In a way this Charter also describes the content of the right to water, since it mentions the quality, quantity and affordability of drinking water supply. The European Water Charter states that *'[e]veryone has the right to a sufficient quantity of water for his or her basic needs*'. These recognised rights (the right to be free from hunger and the right to an adequate standard of living) guarantee a '*minimum quantity of water of satisfactory quality from the point of view of health and hygiene*', and some social measures should be taken *'to prevent the supply of water to destitute persons from being cut off'.*[537]

A couple of years afterwards the Parliamentary Assembly reaffirmed the validity of the principles laid down in the European Charter on Water Resources through Recommendation 1668 (2004)1 on the management of water resources in Europe,[538] which can be interpreted as a reaffirmation of the recognition of the derivative human right to water. In this document the Assembly welcomes and supports the objective of significantly reducing the number of persons without access to safe drinking water, as accepted in the United Nations Millennium Declaration, the Johannesburg World Summit on Sustainable Development Plan of Implementation and Agenda 21.

[534] Council of Europe, Resolution (67) 10 (adopted by the Ministers' Deputies on 26 May 1967, published on 6 May 1968), para I.
[535] Council of Europe, Resolution (67) 10, para V.
[536] Council of Europe, Recommendation Rec(2001)14 (adopted on 17 October 2001), para 5.
[537] Council of Europe, Recommendation Rec(2001)14 (adopted on 17 October 2001), para 5
[538] Parliamentary Assembly, Recommendation 1668 (2004)1 (adopted on 25 June 2004), para 2.

Then in 2006, with the adoption of Recommendation 1731(2006), the Parliamentary Assembly specifically states the main benefits of recognising the right to water as a human right. The Parliamentary Assembly states that:

> *'Recognising access to water as a fundamental human right could serve as an important tool to encourage governments to improve their efforts to meet basic needs and accelerate progress towards achieving the MDGs. A rights-based approach to water would be a very important means for civil society to hold their governments accountable for ensuring access to an adequate quantity of good quality of water as well as sanitation'.*[539]

Due to the concerns about a possible situation of water scarcity, the Parliamentary Assembly adopted on 2 October 2009 Resolution 1693(2009). The Parliamentary Assembly is aware of the consequences that water scarcity can generate, since water is a transboundary resource, its shortage will create conflicts between states. The Parliamentary Assembly states in this Resolution that *'it is primarily drinking water resources that will become increasingly rare'*. This means that water for human consumption will be the first usage to be affected. For this reason the Parliamentary Assembly *'stresses that access to water must be recognised as a fundamental human right because it is essential to life on earth and is a resource that must be shared by humankind'*.[540] In this Resolution the Parliamentary Assembly also regrets that the Istanbul Ministerial Statement, adopted during the 5th World Water Forum on 22 March 2009, did not recognise the right to water and sanitation as a human right. On the other hand, it welcomes the fact that at the G8 meeting in July 2009, world leaders and heads of developing countries agreed on '*the need to recognise as a human right the access by all the world's populations to sources of water'*. Therefore, the Assembly recommends through this Resolution that member and non-member states take the measures needed to ensure that everyone has access to water and sanitation. The Parliamentary Assembly also states that it will continue to address this issue, and will pursue its reflexion on the possibility of drafting legislation on the right to water and sanitation as a human right.

In its process of pursuing the recognition of the human right to water the Parliamentary Assembly adopted on 15 April 2011 Resolution 1809(2011). The Parliamentary Assembly is concerned about drinking water depletion, its causes and particularly its consequences. In this Resolution the Assembly points out that globalisation, irrigation, wastage and pollution are the major factors contributing to the depletion of fresh water and drinking water, and that water shortages lead to conflicts that may threaten the political and social stability of states. Therefore, the Parliamentary Assembly recommends that the authorities of the member and non-member states of the Council of Europe: '*recognise that access to water is a fundamental human right, in line with the United National General Assembly Resolution 64/292 of 28 July 2010 and the*

[539] Parliamentary Assembly, Recommendation 1731(2006) (adopted 24 January 2006), para 5.
[540] Parliamentary Assembly, Resolution 1693(2009) (adopted on 2 October 2009).

United Nations Human Rights Council Resolution 15/9 of 30 September 2010; apply and, if necessary, revise the rules of international water law'.[541] The Parliamentary Assembly Resolution states that the mentioned Resolution of the Human Rights Council affirmed that the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the higest attainable standard of physical and mental health, as well as the right to life and human dignity. It is clear that the Parliamentary Assembly understands the link that exists between international water law and the human right to water, since it is important that the former contributes to guaranteeing access to water for human consumption as a priority particularly in places with scarce water resources. To facilitate the implementation of the human right to water, the Parliamentary Assembly also recommends promoting fairer water charges and providing distribution services of drinking water of good quality in sufficient quantities, as well as acceptable, accessible and affordable sanitation services, as recommended in the Human Rights Council Resolution 15/9. This Resolution and the Charter on Water Resources reaffirms the position of the Council of Europe, accepting that there is a fundamental human right to water that is derived from other rights, in particular the right to an adequate standard of living.

4.2.1.2. United Nations Economic Commission for Europe

The UNECE was set up in 1947 by the ECOSOC to give effective aid to the countries devastated by the war.[542] It is one of the five regional commissions of the United Nations. [543] The UNECE's major aim is to promote pan-European economic integration.[544]

The UNECE is nowadays composed of 56 member states.[545] Its member states include the countries of Europe, but also countries in North America (Canada and the United States) and central and western Asia (such as Kazakhstan, Kyrgyzstan,

[541] Parliamentary Assembly, Resolution 1809 (2011) (adopted on 15 April 2011), para 14.
[542] Resolution 36 (IV) (adopted on 28 March 1947 by the Economic and Social Council).
[543] The other four regional commissions are: Economic Commission for Africa, Economic and Social Commission for Asia and the Pacific, Economic Commission for Latin America and the Caribbean, and Economic and Social Commission for Western Asia.
[544] United Nations Economic Commission for Europe, 'Mission' <http://www.unece.org/termsofreferenceandrulesofprocedureoftheunece.html> accessed 12 June 2013.
[545] Albania, Andorra, Armenia, Austria, Azerbaijan. Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxemburg, Malta, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Republic of Moldova, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Tajikistan, The Former Yugoslav Republic of Macedonia, Turkey, Turkmenistan, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, and Uzbekistan.

Turkmenistan).[546] The UNECE facilitates greater economic integration and cooperation among its member states and promotes sustainable development and economic prosperity through, inter alia, the negotiation of international legal instruments, development of regulations and norms, exchange and application of best practices.[547]

The UNECE focuses on different main areas of work, inter alia, environmental policy, and Millennium Development Goals. The broad aim of the UNECE's environmental activity is to safeguard the environment and human health, and to promote sustainable development in line with Agenda 21.[548] Within the UNECE five environmental treaties have been adopted, all of which are now in force. One of those conventions is relevant for our study: the Convention on the Protection and Use of Transboundary Watercourses and International lakes (hereinafter the UNECE Water Convention).[549] The UNECE Water Convention is intended to strengthen national measures for the protection, preservation and management of international surface and groundwater. The UNECE Water Convention requests states parties to utilise in their respective territories international watercourse in an equitable and reasonable manner.[550]

Initially the UNECE Water Convention was adopted as a regional instrument for the members of the UNECE. Nevertheless, not all member states of the UNECE are party to the Convention. For instance Canada, the United States, Israel and some of the western Asian countries have not yet ratified the UNECE Water Convention. Therefore, its actual implementation so far is centred among European states. On the other hand, on 28 November 2003, the UNECE Water Convention was amended to allow accession by all member states of the United Nations. The amendment entered into force on 6 February 2013, turning this regional Convention into a potential international legal framework for transboundary water cooperation. As a result, non-UNECE countries are now able to join the Convention

The first meeting of the parties to the UNECE Water Convention mentioned that an international instrument aimed at facilitating the eradication of water-related disease throughout Europe would be drawn up for adoption at the 1999 London Conference on Environment and Health. This instrument should be based on the European Charter on Environment and Health, the Environment and Health Action Plan for Europe, the

[546] United Nations Economic Commission for Europe, About UNECE, Geographical scope, <http://www.unece.org/oes/nutshell/region.html> accessed 12 June 2013.
[547] United Nations Economic Commission for Europe, About UNECE, Objective and mandate, <http://www.unece.org/oes/nutshell/mandate_role.html> accessed 12 June 2013.
[548] United Nations Economic Commission for Europe, Main areas of work, Environmental Policy, <http://www.unece.org/env/welcome.html> accessed 12 June 2013.
[549] The Convention on the Protection and Use of Transboundary Watercourses and International lakes (adopted on 17 March 1992, in Helsinki, entered into force 6 October 1996) 1936 UNTS 269.
[550] The Convention on the Protection and Use of Transboundary Watercourses and International lakes, Articles 1 and 5.

WHO Health for All Targets, and Agenda 21.[551] As a result, the Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International lakes (hereinafter the Protocol on Water and Health) was adopted in London, on 17 June 1999.[552] The parties to the Protocol have committed themselves to achieve international goals on access to safe drinking water as agreed upon in Agenda 21 and recognise that there are synergies between the Protocol and the human rights perspective of access to water.[553]

Due to the interconnection that exists between the implementation of the Protocol and the realisation of the human right to water, the Compliance Committee, created by the Meeting of the Parties to the Protocol, has established an exchange of information and cooperation with the secretariat of the Office of the High Commissioner for Human Rights and with the Independent Expert (nowadays Special Rapporteur) on the issue of human rights obligations related to safe drinking water and sanitation. The idea is to regularly exchange information that could support each other's work, and possible to joint country missions and lobbying by the Independent Expert vis-a-vis non-parties to ratify the Protocol as a useful means to implement the human right to water.[554]

Although the Protocol on Water and Health did not expressly recognise access to water as a human right, there is a clear relationship between the implementation of this Protocol and the realisation of the mentioned right, since the Protocol is aiming at ensuring access to drinking water to everyone (article 6(1)(a)).

4.2.2. Materialisation of the right to water at the European level

At the pan-European level there are a number of conventions that may recognise and contribute to the realisation of the right to water. These conventions can be classified in the areas of human rights and environmental law, and have been adopted by the Council of Europe and the UNECE. Under the auspices of the Council of Europe the following three conventions regarding human rights have been adopted: 1) the Convention for the Protection of Human Rights and Fundamental Freedoms, generally referred to as the European Convention on Human Rights;[555] 2) the European Social Charter;[556] and 3)

[551] United Nations Economic Commission for Europe, "Report of the First Meeting of the Parties of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes". Helsinki 2-4 July 1997. UN.Doc. ECE/MP.WAT/2, Annex II, 26.
[552] Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (adopted on 17 June 1999, in London, entered into force on 4 August 2005) 2331 UNTS 202.
[553] Meeting of the Parties to the Protocol on Water and Health, 'Declaration of the First Meeting of the Parties' (3 July 2007) ECE/MP.WH/2/Add2, paras 2, 9.
[554] Economic Commission for Europe, World Health Organisation Regional Office for Europe, 'Report of the Compliance Committee to the Meeting of the Parties to the Protocol on Water and Health' (1 September 2010) ECE/MP.WH/2010/3- EUDPH/1003944/4.2/1/9, paras 36-38.
[555] Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention) (adopted on 4 November 1950, entered into force on 3 September 1953).

the European Convention on the Prevention of Torture and Inhuman and Degrading Treatment or Punishment.[557] On the other hand, the UNECE facilitated the negotiations for the Protocol on Water and Health to the 1992 UNECE Water Convention. Each one of the aforementioned conventions will be analysed to see whether they have explicitly recognised the right to water.

4.2.2.1. European Convention on Human Rights

The European Convention on Human Rights was signed in Rome in 1950 and entered into force in 1953. The European Convention has as a main monitoring body a judicial organ, namely the European Court of Human Rights. The ECtHR was set up in 1959.[558] The ECtHR sits permanently to consider complaints brought by individuals or states alleging violations of the rights and freedoms set out in the European Convention on Human Rights and its protocols.[559] Among the rights incorporated in the European Convention there is the right to life; prohibition of torture; prohibition of slavery and forced labour; the right to liberty and security; the right to fair trial; the right to respect for private and family life; freedom of thought, conscience and religion; freedom of expression; freedom of assembly and association, the right to marry, the right to an effective remedy; and prohibition of discrimination. In general these are civil and political rights.

Reference to access to water has not been included in any of the rights or freedoms embraced in the European Convention. The most logical explanation for this absence is the early adoption of the Convention in1950, when water scarcity and therefore, access to drinking water was not yet considered to be a problem.

4.2.2.2. European Social Charter (Revised)

The European Social Charter, adopted in 1961 and revised in 1996[560], guarantees social and economic rights. The Revised Charter is gradually replacing the Charter of 1961, and provides a more complete list of rights. It complements the rights and freedoms protected under the European Convention on Human Rights, with the adoption of

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[556] European Social Charter (revised), adopted 3 May 1996, entered into force 1 July 1999.

[557] European Convention on the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (adopted on 26 November 1987, entered into force on 1 February 1989).

[558] Paul Mahoney and Søren Prebensen, 'The European Court of Human Rights" in R. St. J Macdonald, F. Matscher, and H. Petzold (eds), *The European System for the Protection of Human Rights of Human Rights* (Martinus Nijhoff Publishers, Dordrecht 1993) 622. idem

[559] Rhona K. M. Smith, 'Human Rights in International Law" in Michael Goodhart (ed), *Human Rights: politics and Practice* (OUP, Oxford 2009) 40. idem

[560] European Social Charter (adopted on 18 October 1961, entered into force on 26 February 1965); European Social Charter (revised), (adopted 3 May 1996, entered into force 1 July 1999).

economic and social rights.[561] The particularity of this instrument is that state parties are not bound by the Charter as a whole; instead states are only bound by a number of rights that they can pick themselves.[562] This can be compared with a menu *á la carte*.

The European Social Charter (Revised) is divided in six parts, the first three parts focus on the substantive rights. Part I lists all the rights included in the Charter and provides that state parties accept as the aim of their policy the attainment of conditions in which the listed rights and principles may be effectively realised. Part II incorporates in total 31 articles, where the economic and social rights and their respective obligations are explained. Part III describes the undertakings that states parties assume. Accordingly, each state party undertakes to consider Part I of the Charter as a declaration of the aims which it will pursue by all appropriate means. Part III also establishes that states must select and consider itself bound by at least six of the following nine rights,: the right to work (art. 1); the right to organise (art. 5); the right to bargain collectively (art. 6); the right of children and young persons to protection (art. 7); the right to social security (art. 12); the right to social and medical assistance (art. 13); the right of family to social, legal and economic protection (art. 16); the right of migrant workers and their families to protection and assistance (art. 19); and the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex (art. 20).[563] Moreover, states shall consider themselves bound by an additional number of articles or paragraphs included in Part II of the Charter, which they may select, provided that the total number of article or paragraphs is not less than sixteen articles or sixty-three numbered paragraphs.[564] Among the additional rights that states can choose are the right to protection of health (art. 11), and the right to housing (art 31).

Due to the statement made in Part III that states that the list of rights made in Part I shall be considered as a declaration, it is considered that there is a vague legal obligation to promote all the rights listed therein, and a stronger obligation with respect to the rights selected by each state.[565]

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[561] Matti Pellonpää, 'Economic, Social and Cultural Rights' in R. St. J Macdonald, F. Matscher, and H. Petzold (eds), *The European System for the Protection of Human Rights of Human Rights* (Martinus Nijhoff Publishers, Dordrecht 1993) 855.

[562] Revised European Social Charter, Part III, Article A. (1) "Subject to the provision of Article B below, each of the Parties undertakes: a) to consider Part I of this Charter as a declaration of the aims which it will pursue by all appropriate means, as states in the introductory paragraph of that part; b) to consider itself bound by at least six of the following nine number of articles or numbered paragraphs of Part II of the Charter with it may select, provided that the total number of articles or numbered paragraphs by which it is bound is not led than sixteen articles or sixty-three numbered paragraphs".

[563] Revised European Social Charter, Part III, Article A (1. b.).

[564] Revised European Social Charter, Part III, Article A (1. c.).

[565] Matti Pellonpää, 'Economic, Social and Cultural Rights' in R. St. J Macdonald, F. Matscher and H. Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff Publishers, Dordrecht 1993) 856.

The European Committee of Social Rights is the supervisory body of the European Social Charter. It is a non-judicial organ that rules on the conformity with the European Social Charter. The monitoring compliance of the European Committee of Social Rights consists of two procedures: a monitoring procedure based on national reports, and a collective complaints procedure, where complains of violations may be lodged by organisations.[566]

Although the European Social Charter which incorporates economic and social right was revised in 1996, access to water is not explicitly mentioned in this instrument.

4.2.2.3. The European Convention on the Prevention of Torture and Inhuman and Degrading Treatment or Punishment

The European Convention on the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (hereinafter the European Convention on Torture)[567] was adopted because it was thought that the protection of persons deprived of their liberty against torture and inhuman or degrading treatment or punishment could be strengthened by non-judicial means of a preventive character based on visits.[568] The European Convention on Torture established the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter CPT). The CPT provides a non-judicial mechanism to protect persons deprived of their liberty against torture and other forms of ill-treatment, based on visits. The CPT organises visits to places of detention, to assess how persons deprived of their liberty are treated. It therefore, complements the work of the European Court of Human Rights.[569] The Convention is not concerned solely with prisoners, but with any person deprived of his or her liberty by a public authority. The places of detention that the CPT visits include prisons, juvenile detention centres, police stations, holding centres for immigration detainees and psychiatric hospitals. After each visit to detention or prison facilities, the CPT draws up a report on the facts found during the visit, and it may

[566] Additional Protocol to the Social Charter Providing for a System of Collective Complaints (adopted 9 November 1995, entered into forced on 1 July 1998) establishes in its article 1 that the Contracting parties to this Protocol recognize the right of the following organisations to submit complaints by: a) international organization of employers and trade unions referred to in paragraph 2 of Article 27 of the Charter; b) other international non-governmental organisation which have consultative statues with the Council of Europe and have been put on a list established for this purpose by the Governmental Committee; c) representative national organisations of employers and trade unions within the jurisdiction of the Contracting Party against which they have lodged a complaint.

[567] The European Convention on Torture (entered into force on 1 February 1989, last amended by Protocols No. 1 and No.2, which entered into forced on 1 March 2002).

[568] Preamble of the European Convention on Torture. See also Antonio Cassese, 'A New Approach to Human Rights: The European Convention for the Prevention of Torture' (1989) 83 (1) The American Journal of International Law.

[569] Council of Europe, 'European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment' <http://www.cpt.coe.int/en/about.htm> accessed 30 September 2012.

suggests improvements in the protection of persons deprived of their liberty.[570] The CPT also publishes a yearly report based on its visits.

The Convention does not embrace specific rights. It describes the tasks that the CPT and the states shall undertake to achieve the prevention of torture and ill-treatment of persons deprived of their liberty. Therefore, since the Convention focuses on the procedural task, and human rights are not incorporated therein, it is logical that access to water is not explicitly mentioned in the Convention. Nevertheless, some of the yearly reports that the CPT publishes have affirmed that it is important to supply drinking water to persons deprived of their liberty. Some of those reports will be examined in the section concerning the implementation of the right to water in regional human rights law.

4.2.2.4. Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes

Bearing in mind that water is essential to sustain life and to meet basic human needs the Protocol on Water and Health aims to complement the UNECE Water Convention with further measures to strengthen the protection of public health,[571] to be achieved not only by ensuring access to drinking water, but also through the prevention, control and reduction of water-related diseases in general.

Although, there is no explicit reference in any part of the Protocol regarding the human right to water as such, the Protocol indirectly, but unambiguously, refers to the implementation of such a right. The preamble of this Protocol provides that state parties are aware of the consequences for public health of shortfalls of water in the quantities, and of the quality, sufficient to meet basic human needs, and of the serious effects of such shortfalls, in particular on the vulnerable, the disadvantaged and the socially excluded.[572] Additionally, article 4 of the Protocol provides that parties shall take all appropriate measure for the purpose of ensuring *'[a]dequate supplies of wholesome drinking water which is free from any micro-organisms, parasites and substances which, owing to their numbers or concentration, constitute a potential danger to human health. This shall include the protection of water resources which are used as sources of drinking water, treatment of water and the establishment, improvement and maintenance of collective system*'.[573] If we look closer at this provision, it is possible to identify two core elements of the human right to water: sufficient and safe water. When the Protocol talks about adequate supplies of wholesome drinking water, it can be interpreted as the supply of sufficient amounts of water. The other part of the cited

[570] European Convention on Torture, article 10.
[571] See preamble of the Protocol on Water and Health.
[572] See preamble of the Protocol on Water and Health
[573] Protocol on Water and Health, Article 4 (2) (a).

article concerns the quality of water, which must be free from elements that constitute a potential danger to human health, in other words, safe water.

Moreover, and more clearly, article 6 provides that to achieve the objectives of the Protocol, state parties must pursue the aim of, among other, guaranteeing access to drinking water for everyone. Furthermore, the Protocol establishes that for its implementation state parties shall be guided by certain principles and approaches, which include special consideration of the protection of the people who are particularly vulnerable to water-related disease; and equitable access to water, adequate in terms both of quantity and quality, provided for all members of the population, especially those who suffer a disadvantage or social exclusion. [574] The Protocol on Water and Health provides a sound framework for the translation of the human right to water into practice. The aim and the mentioned objective of the Protocol reflect the main elements that make up the human right to water.

To achieve the protection of human health and well-being, state parties shall pursue the aims of access to drinking water and provision of sanitation for everyone and shall adopt and publish national and/or local targets to achieve or maintain a high level of protection against water-related diseases. Those targets must be periodically revised. Targets shall include, inter alia: a) the quality of the drinking water supplied, taking into account the guidelines for drinking-water quality of the WHO; b) the reduction of the scale of outbrakes and incidents of water-related disease, c) the area of territory or population size that should be served by collective systems of supply of drinking water or where the supply of drinking water by other means should be improved; d) the area of territory or the population size or proportions, which should be served by collective systems for the supply of sanitation or where sanitation by other means should be improved; e) the levels of performance to be achieved by such collective systems and by such other means of water supply and sanitation respectively; f); the application of recognised good practice to the management of water supply and sanitation including the protection of waters used as source for drinking water; g) the occurrence of discharge of untreated waste water and untreated storm water overflows from waste water collection systems to water within the scope of this Protocol; h) the quality of discharges of waste water from waste-water treatment installations of water within the scope of this protocol; among others.[575]

At the first meeting of the Parties, in January 2007, the Parties adopted Decision I/2 on Review of Compliance, and elected the first Compliance Committee.[576] The objective of the compliance procedure is to facilitate, assist, promote and secure compliance with the obligations under the Protocol, with a view to preventing disputes rather than

[574] Protocol on Water and Health, Article 5, (k) (l).
[575] Protocol on Water and Health, Article 6.
[576] Decision I/2 on Review of Compliance, adopted on the first meeting of the Parties to the Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Geneva, 17-19 January 2007.

condemning governments.[577] One important feature of the compliance mechanism is the involvement of the public. It provides for the possibility that members of the public write communications to the Compliance Committee about cases of alleged non-compliance with the Protocol, which the Committee is required to deal with.

4.3. Inter-American human rights system

The Inter-American System on Human Rights was created by the Organization of American States (OAS), constituted by the Charter of the OAS, which entered into force in 1951.[578] The OAS consists of all 35 independent states of the Americas.[579] This regional system is composed of two subsystems. One is stemming from the Charter of the OAS and the other is stemming from the American Convention on Human Rights (hereinafter the American Convention) adopted in 1969. It should be borne in mind that these two subsystems share a common organ, the Inter-American Commission on Human Rights (hereinafter IAComHR); however, the scope and jurisdiction of the IAComHR varies depending on whether it exercises its function in one or the other subsystem.[580]

a) Subsystem based on the Charter of the OAS

At the ninth International American Conference, held in 1948 in Bogotá, Colombia, the American states adopted two important juridical instruments: (a) the Charter of the Organization of American States[581], which also proclaims fundamental rights of individuals and (b) the American Declaration of the Rights and Duties of Man[582], which develops the rights set forth in the Charter of the OAS.[583]

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[577] United Nations Economic Commission for Europe, Protocol on Water and Health, Implementation and compliance, <http://www.unece.org/env/water/pwh_implementation.html> accessed 17 August 2012.
[578] Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (CUP, Cambridge 2003) 4.
[579] Antigua and Barbuda, Argentina, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba (on 3 June 2009 the OAS General Assembly revoked the 1962 OAS resolution that suspended Cuba, who needs to comply with certain conditions), Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, the Bahamas, Trinidad and Tobago, United States of America, Uruguay and Venezuela.
[580] Héctor Faúndez Ledesma, *The Inter-American System for the Protection of Human Rights, Institutional and Procedural aspects* (3rd edn, Inter-American Institute of Human Rights, San Jose 2008) 26.
[581] Charter of the Organisation of American States (adopted on 30 April 1948, entered into force on 13 December 1951). OAS, Treaty Series NOS. 1-C and 61.
[582] American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).
[583] Héctor Faúndez Ledesma, *The Inter-American System for the Protection of Human Rights, Institutional and Procedural aspects* (3rd edn, Inter-American Institute of Human Rights, San Jose (Costa Rica) 2008) 26.

Then, in 1959 the IAComHR was established by the OAS.[584] The IAComHR has jurisdiction over all member states of the OAS to monitor human rights.[585] The IAComHR receives, analyses and investigates individual petitions that allege violations of human rights set forth in the American Declaration of the Rights and Duties of Man in relation to the member states of the OAS that are not parties to the American Convention.[586] In other words this system applies for those states that have not ratified the American Convention, and therefore do not recognise the competence of the Inter-American Court of Human Rights.

The IAComHR can receive petitions of any person, or group of persons, or non-governmental entities legally recognised in one or more of the member states of the OAS concerning violations of human rights recognised in any of the human rights conventions adopted under the auspices of the OAS. The IAComHR may also, motu propio, initiate the processing of a petition. In serious and urgent situations the IAComHR may, on its own initiative or at the request of a party, request that a state adopts precautionary measures to prevent irreparable harm to persons or to the subject matter of a pending petition or case.[587]

b) Subsystem based on the American Convention on Human Rights

The American Convention on Human rights, adopted on 2 November 1969, also known as the 'Pacto the San Jose'[588], set forth a series of human rights to be protected. The Convention empowers two bodies, the already established IAComHR and the Inter-American Court of Human Rights (hereinafter IACtHR) to ensure compliance with the human rights enshrined in the Convention.[589]

The IACtHR is the sole judicial organ of the Inter-American system.[590] The IACtHR has mainly two functions: an advisory and a judicial function. Regarding the advisory function any member of the OAS may consult the IACtHR regarding the interpretation of the American Convention or other treaties concerning the protection of human rights

[584] Organization of American States. Inter-American Commission on Human Rights, What is the IACHR? <http://www.oas.org/en/iachr/mandate/what.asp> accessed 20 December 2012.
[585] Charter of the Organisation of American States Article 106; Rhona K. M. Smith, *Text and Materials on International Human Rights* (Routledge-Cavendish, New York 2007) 169.
[586] Rules of Procedure of the Inter-American Commission on Human Rights (approved by the Commission at its 137th regular period sessions, held from October 28 to November 13, 2009, and modified on 2 September 2011, and during the 147th regular period of sessions, held from 8 to 22 March 2013, entered into force on 1 August 2013), Article 51<http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp> accessed 18 August 2013.
[587] Rules of Procedure of the Inter-American Commission on Human Rights, Articles 23 to 25.
[588] American Convention on Human rights (adopted on 22 November 1969, entered into force 18 July 1978) OAS, Treaty Series 36.
[589] Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd edn, CUP, Cambridge 2013) 3.
[590] Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd edn, CUP, Cambridge 2013) 1.

in the American States.[591] Concerning the judicial function, the IACtHR can rule on whether a state has violated individual's human rights. But the IACtHR can only exercise its judicial function over states that have accepted its jurisdiction.[592]

The American Convention establishes a two tier system. The first tier is developed before the IAComHR, and the second before the IACtHR. Thus, in order for the IACtHR to hear a case, it is necessary that a procedure before the IAComHR has been exhausted. When a state involved in a case examined by the IAComHR, has recognised the jurisdiction of the IACtHR and the IAComHR considers that the state has not complied with its recommendations or the parties have not reached a settlement, then the case is submitted to the IACtHR, unless there is a reasoned decision by an absolute majority of the members of the IAComHR to the contrary.[593]

Since the IAComHR is a body shared by the two subsystems, it is important to clarify that the IAComHR deals with alleged violations of human rights concerning all member states of the OAS, whether they have ratified or not the American Convention. In the case of states that ratified the American Convention the alleged violations of human rights are examined based on this Convention. For those states that have not ratified the American Convention, the IAComHR examines their international responsibility based on the American Declaration of the Rights and Duties of Man,[594] thus, falling in the subsystem based on the Charter of the OAS.

If an individual, group of individuals, or non-governmental organizations wish to present a potential allegation of human rights violation, they shall do it before the IAComHR.[595] Only states and the IAComHR have the right to submit a case before the IACtHR. [596] The jurisdiction of the IACtHR comprises all cases concerning the interpretation and application of the provisions of the American Convention on Human rights that are submitted to it, provided that state parties to the case recognise or have recognised such jurisdiction.[597] The judgment of the IACtHR shall be final and not

[591] The American Convention on Human Rights, Article 64.
[592] Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*. (2nd edn, CUP, Cambridge 2013) 10.
[593] Rules of Procedure of the Inter-American Commission on Human Rights, Articles 45, 74.
[594] Rules of Procedure of the Inter-American Commission on Human Rights, Articles 51-52.
[595] The American Convention on Human Rights, Article 44 and 61.
[596] The American Convention on Human Rights, Article 61.
[597] The American Convention on Human Rights, Article 62. States that have already recognised the jurisdiction of the Court are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad y Tobago (denounced the American Convention on 26 May 1998 and it was effective a year after, on 26 May 1999), Uruguay and Venezuela (presented to the Secretary General of the Organization of American States a notice of denunciation of the American Convention on Human rights, dated September 6, 2012. The denunciation will enter into effect one year from the date of the presentation of the letter). Among the states that have not recognised the jurisdiction of the IACtHR are Bahamas, Belize, Canada, Jamaica and United States[597].

subject to appeal. However, in case of disagreement as to the meaning or scope of the judgment, the IACtHR shall interpret it at the request of any of the parties to the case.[598]

The IACtHR shall monitor compliance with decisions (judgments and orders) through the submission of reports by the states and observations to those reports by the victims or their legal representatives. In addition, the IAComHR shall present observations to the state's reports and to the observations of the victims or their representatives. If necessary the IACtHR may require from other sources of information relevant data or an expert opinion to evaluate compliance therewith. When it seems appropriate the IACtHR may convene the state and the victims' representative to a hearing to monitor compliance with its decisions. Once the IACtHR has obtained all relevant information, it shall determine the state of compliance with its decisions and issue the pertinent orders.[599]

Subsequently, the IACtHR shall every year submit a report to the General Assembly of the OAS concerning its work during the previous year. In the report the IACtHR shall specify the cases in which a state has not complied with its judgment, and make pertinent recommendations.[600]

4.3.1. Recognition of the right to water in regional declarations, statements, resolutions and action plans

The General Assembly of the OAS has adopted some resolutions concerning access to drinking water. In June 2007, the General Assembly recognised that water is essential to the life and health of all human beings and that access to safe drinking water and sanitation is indispensable for a life with human dignity.[601] This recognition was made bearing in mind international human rights instruments concerning the human right to water, such as the Convention on the Elimination of All Forms of Discriminations against Women; the Convention on the Rights of the Child; articles 10 and 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights; and General Comment 15 (2002) on the right to water, of the UN Committee on Economic, Social and Cultural rights.

Afterwards, on 5 June 2012, the General Assembly of the OAS adopted a Resolution on the human right to safe drinking water and sanitation, reaffirming the importance for

[598] American Convention on Human rights, Article 67.
[599] Rules of Procedure of the Inter-American Court on Human Rights, (approved by the Court during its XLIX Ordinary Period of Sessions, held from November 16 to 25, 2000, and partially amended by the Court during its LXXXII Ordinary Period of Sessions, held from January 19 to 31, 2009, entered into force on 24 March 2009), Article 63 <http://www.corteidh.or.cr/sitios/reglamento/ene_2009_ing.pdf> accessed 20 June 2013.
[600] American Convention on Human Rights, Article 65.
[601] General Assembly of the OAS, Resolution on Water, Health and Human Rights (adopted on 5 June 2007) AG/RES.2349 (XXXVII-O/07).

each state to continue its efforts to ensure that individuals subject to its jurisdiction have access to safe drinking water and sanitation as integral components of the realisation of all human rights. This resolution invites member states of the OAS '*in keeping with their national realities, to continue working to ensure access to safe drinking water and sanitation services for present and future generations*'.[602]

With regard to this resolution Canada and the United States made some remarks. The United States declared that it has joined the consensus on several UN Human Rights Council resolutions on this topic affirming that the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and is inextricable related to the right to health.

The United States also expressed that '*[t]he right to safe drinking water and sanitation is not one that is protected in our Constitution, nor is it justiciable as such in U.S. court, though various U.S. laws protect citizens from contaminated water. As a matter of public policy, our people have created a society in which there is a widespread expectation that all ought to have access to safe drinking water and sanitation. Public authorities throughout the United States take significant measures to provide access to safe drinking water and sanitation*'.[603]

It seems to be clear that the position of the United States is to deny the recognition of the right to water as an independent right and therefore, to avoid the possibility of its justiciability in its courts. For this country, up till now, the right to drinking water may exist only as a derivative right.

On the other hand, Canada accepts the recognition of the right to safe drinking water, understood as a matter of national concern only. Canada clarifies that '*this right does not encompass transboundary water issues including bulk water trade, nor any mandatory allocation of international development assistance, and that Member States will pursue the progressive realization of access to safe drinking water and basic sanitation for their populations through national and sub-national actions, with a particular emphasis on people living in vulnerable situation*'. [604] Based on the abovementioned statement it can be inferred that Canada is trying to restrict the obligations that derive from the human right to water only to its population; in other words accepting only territorial obligations. Besides, Canada is clearly denying the extraterritorial obligations (meaning the obligations that one state has towards other states or the individuals located in other states) that emerge from its duty to provide international assistance, as established in the ICESCR.

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[602] General Assembly of the OAS, Resolution The Human Right to Safe Drinking Water and Sanitation (adopted on 5 June 2012) AG/RES.2760 (XLII-0/12).

[603] General Assembly of the OAS 'Resolution The Human Right to Safe Drinking Water and Sanitation'(adopted at the 4th plenary session, 5 June 2012) AG/RES.2760 (XLII-0/12), footnote 1.

[604] General Assembly of the OAS 'Resolution The Human Right to Safe Drinking Water and Sanitation'(adopted at the 4th plenary session, 5 June 2012) AG/RES.2760 (XLII-0/12), footnote 2.

The OAS recognises the right to water as a derivative right and encourages member states to continue working on ensuring access to water for present and future generations.

4.3.2. Materialisation of the right to water in the Inter-American system

The Inter-American system has a normative basis consisting of several instruments: the American Declaration of the Rights and Duties of Man, and the American Convention on Human Rights; the Protocol to the American Convention on Human Rights on the Abolition of the Death Penalty; the Inter-American Convention to Prevent and Punish Torture[605]; the Inter-American Convention on Forced Disappearance of Persons[606]; the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women[607]; and the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador)[608].

The American Declaration on the Rights and Duties of Man protect both civil and political rights as well as economic, social and cultural rights, including the right to life, equality before law, protection of mothers and children, the right to residence and movement, the right to religious freedom and worship, the right to family, inviolability of the home, the right to the preservation of health and to well-being, the right to education, the right to work and fair remuneration, the right to leisure time, the right to property, the right to assembly, the right to due process of law, the right to protection form arbitrary arrest, and the right of asylum.

The rights protected by the American Convention are mostly civil and political rights, including the rights to life, the right to have a name, the right to nationality, the right property, the right privacy, the right to human treatment, the right to a fair trial, the right to assembly, and the right to compensation where there has been a miscarriage of justice.

In fact, none of the instruments adopted under the auspices of the OAS have explicitly included access to water. Nevertheless, the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, provides in article 11 that everyone has the right to live in a healthy environment and to have access to basic public services. It would be logical to consider that the right to

[605] Inter-American Convention to Prevent and Punish Torture (adopted on 9 December 1985, entered into force on 28 February 1987).
[606] Inter-American Convention on Forced Disappearance of Persons (adopted on 9 June 1994, entered into force on 29 March 1991).
[607] Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (adopted on 9 June 1994, entered into force on 5 March 1995).
[608] Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (adopted on 17 November 1988, entered into force on 16 November 1999).

water is implicit in this provision, since the supply of drinking water is understood to be a basic public service. However, until today, there is no jurisprudence concerning article 11 that can confirm or deny such an assumption. The IACtHR when interpreting this article could establish that the right to water is derived from the right to have access to basic public service.

Recently, two new conventions were adopted, on 5 June 2013, by the General Assembly of the OAS: the Inter-American Convention against All Forms of Discrimination and Intolerance, [609] and the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance. [610] Both conventions explicitly mention the right to water. Article 4 of each Convention provides that states undertake to prevent, eliminate, prohibit and punish all acts and manifestation of discrimination and intolerance, or racism, and racial discrimination, including: the restriction or limitation of the right of every person to access and sustainably use water.[611]

Although these two Conventions are not yet in force, mainly due to their recent adoption and therefore, lack of ratification,[612] their adoption is a first and clear step towards the explicit recognition of the human right to water in this regional system.

4.4. African human rights system

On the African continent there is also a regional organisation that promotes and protects human rights. This organisation is known as the African Union. The Assembly of Heads of State and Government of the Organization of African Unity (OAU), nowadays the African Union, unanimously adopted at the 1981 OAU meeting, in Nairobi Kenya, the African Charter on Human and Peoples' Rights[613], which entered into forced on 21 October 1986. All African countries have signed and ratified the African Charter on Human and Peoples' Rights (hereinafter the African Charter), with the exception of

[609] Inter-American Convention against All Forms of Discrimination and Intolerance (adopted on 5 June 2013 on the Forty-third regular session of the OAS General Assembly, not yet entered into force).
[610] Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance(adopted on 5 June 2013 on the Forty-third regular session of the OAS General Assembly, not yet entered into force).
[611] Inter-American Convention against All Forms of Discrimination and Intolerance, Article 4(xiv); Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance, Article 4(xiv).
[612] At the moment of writing this article, only Antigua and Barbuda, Argentina, Brazil, Costa Rica, Ecuador, and Uruguay are signatories of the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance; and Argentina, Brazil, Ecuador and Uruguay are signatories of the Inter-American Convention against all Forms of Discrimination and Intolerance.
[613] Vincent O. Orlu Nmehielle, *The African Human Rights System, Its Laws, Practiced and Institutions*. (Martinus Nijhoof Publishers, The Hague 2001) 82.

South Sudan. Morocco is the only African state that is not a member of the African Union. As a result, there are in total 53 state parties to the African Charter.[614]

The African system is nowadays composed of two main bodies: the African Commission on Human and Peoples' Rights (hereinafter the African Commission) and the African Court on Human and Peoples' Rights (hereinafter the African Court). The former was established under the African Charter to ensure implementation of the rights enshrined therein.[615] The African Commission has as main functions to promote and ensure the protection of human rights, and to interpret all provisions of the African Charter.[616] The African Commission receives complaints (known as communications) from states, and it has developed a mechanism by which individuals, NGO's and others can submit communications to it, alleging violations of the African Charter by states.[617]

The African Court was established under the auspices of the African Union by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, which entered into force on 25 January 2004. In fact, the African Court began its operation in November 2006. Not all African states are a party to this Protocol. Up until now only 26 countries have ratified the Protocol.[618] The African Court examines cases and disputes submitted to it concerning the interpretation and application of the African Charter, and any other relevant human right instrument ratified by the states concerned.[619] The African Court complements and reinforces the functions of the African Commission.[620]

Recently the African Union decided to merge the recently created African Court of Justice[621] with the African Court of Human Rights, through the Protocol on the Statute

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[614] Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Democratic Republic of the Congo, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Ivory Coast, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leona, Somalia, South Africa, South Sudan, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, Zimbabwe.

[615] African Charter on Human and Peoples' Rights, Article 30.

[616] African Charter on Human and Peoples' Rights, Article 45.

[617] Rachel Murray, *Human Rights in Africa, From the OAU to the African Union* (CUP, Cambridge 2004) 51.

[618] Algeria, Burkina Faso, Burundi, Cote d'Ivoire, Comoros, Congo, Gabon, Gambia, Ghana, Kenya, Libya, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, South Africa, Senegal, Tanzania, Togo, Tunisia and Uganda. See African Court on Human and Peoples' Rights <http://www.african-court.org/en/index.php/about-the-court/brief-history> accessed 30 November 2012.

[619] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African court on Human and Peoples' Rights (adopted on 10 June 1998, entered into force on 25 January 2004), Article 3 <http://www.african-court.org/en/images/documents/Court/Court%20Establishment/africancourt-humanrights.pdf> accessed 30 November 2012.

[620] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. Article 2 the relationship between the Court and the Commission.

[621] The Constitutive Act of the African Union (adopted on 7 November 2000, entered into force on 26 May 2001) provides in its article 18 that a Court of Justice shall be established. However, this Act does not determine the composition and functions of the Court; it leaves these matters to be determined by a

of the African Court of Justice and Human Rights, adopted on 1 July 2008. This Protocol will enter into force after 15 member states have ratified it. So far, only five countries have ratified this Protocol. The Court of Justice and Human Rights will be composed of two sections, one for general affairs and the other one for human rights.[622]

4.4.1. Recognition of the right to water in regional declarations, statements, resolutions and action plans

On 17 September 2004 the Pretoria Declaration on Economic, Social and Cultural Rights in Africa was adopted at a seminar held in Pretoria, South Africa, at which representatives of the African Commission, 12 African states, national human rights institutions and NGOs participated. The Declaration was adopted by the African Commission at its 36th session in December 2004.[623] This declaration contains a non-exhaustive list of the content of each socio-economic right under the African Charter, thus providing a useful guide to the core content of and recommendations on how to implement these rights.[624] This Declaration stipulates that the right to health in article 16 of the African Charter entails, among others, access to adequate supply of safe and potable water.

On 30 November 2006, the first Africa-South America Summit was held in Abuja Nigeria. There, Heads of State and Government declared in the Abuja Declaration that they would promote the right of their citizens to have access to clean and safe water and sanitation within their respective jurisdictions.[625]

During the 11th Ordinary Assembly Session of the African Union, held in Egypt in July 2008, the Heads of State and Government recognised the importance of water and sanitation for the social, economic and environmental development of the African continent. It was also recognised that water is and must remain a key to sustainable development in Africa, and that water supply and sanitation are prerequisites for Africa's human capital development. In this meeting the Heads of State and Government committed themselves to increase their efforts to implement their past declarations related to water and sanitation and particularly to develop and/or update national water management policies, regulatory frameworks, and programmes, and

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future protocol. The Protocol of the Court of Justice of the African Union was adopted on 1 July 2003 and entered into force on 11 February 2009.

[622] Protocol on the Statute of the African Court of Justice and Human Rights, Article 19.

[623] Pretoria Declaration on Economic, Social and Cultural Rights (adopted by the African Commission at its 36th session in December 2004), Preamble <http://www.achpr.org/files/instruments/pretoria-declaration/achpr_instr_decla_pretoria_esc_rights_2004_eng.pdf> accessed on October 2013.

[624] Sibonile Khoza, 'Promoting Economic, Social and Cultural Rights in Africa: The African Commission Holds a Seminar in Pretoria', (2004) 4 African Human Rights Law Journal 340, 343

[625] Abuja Declaration (adopted on the First Africa-South America Summit 26-30 November 2006) <http://asasummit.itamaraty.gov.br/documents/1st-africa-south-america-summit/abuja-declaration/view> access 10 February 2013.

prepare national strategies and action plans for achieving the MDG targets for water and sanitation over the next seven years.[626]

4.4.2. Materialisation of the right to water in the African system

Under the auspices of the African Union the following treaties on human rights have been adopted: a) the African Charter on Human and Peoples' Rights,[627] b) the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women,[628] and c) the African Charter on the Rights and Welfare of the Child[629].

4.4.2.1. African Charter on Human and Peoples' Rights

The African Charter is the main instrument for the promotion and protection of human rights in Africa.[630] The African Charter provides for a wide range of human rights, it includes not only civil and political rights, but also economic, social and cultural rights, rights[631] as well as collective rights. Among them are the right to life, the right to equality before law, the right to receive information, the right to association, the right to work, the right to physical and mental health, the right to education, and the right to a satisfactory environment. The African Charter does not explicitly contain any reference to the right to water.

4.4.2.2. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa was adopted in 2003 and entered into force in 2005. This Protocol was adopted to supplement some of the provision of the African Charter in relation to women's rights and aims at combating all forms of discrimination against women. It enshrines, inter alia, the right to dignity, the right to life, the right to access to justice and the right to equal protection before the law, the right to participate in the political

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[626] Organisation for African Union (General Assembly) 'Declaration Sharm El-Sheikh Commitments for Accelerating the Achievement of Water and Sanitation Goals in Africa' (2008) Assembly/AU/Decl.1 (XI) <http://www.au.int/en/sites/default/files/ASSEMBLY_EN_30_JUNE_1_JULY_2008_AUC_ELEVENTH_ORDINARY_SESSION_DECISIONS_DECLARATIONS_%20TRIBUTE_RESOLUTION.pdf> accessed 30 October 2012.

[627] African Charter on Human and Peoples' Rights (adopted on 1 June 1981, entered into force 21 October 1986).

[628] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (adopted on 11 July 2003, entered into force on 25 November 2005.

[629] African Charter on the Rights and Welfare of the Child (adopted on 1 July 1990, entered into force 29 November 1999).

[630] Rachel Murray, *Human Rights in Africa, From the OAU to he African Union* (CUP, Cambridge 2004) 49.

[631] Rachel Murray, *Human Rights in Africa, From the OAU to the African Union* (CUP, Cambridge 2004) 50.

and decision-making process, the right to peace, the right to education, the right to work, the right to health and reproductive health, the right to food, the right to housing, the right to a healthy environment, the right to inheritance; also, the protection of women in armed conflict, equal rights in marriage, separation, divorce and annulment of marriage.

The Protocol explicitly includes access to drinking water. Article 15 on the right to food security provides that *'States Parties shall ensure that women have the right to nutritious and adequate food. In this regards, they shall take appropriate measures to: a) provide women with access to clean drinking water, sources of domestic fuel, land and the means of producing nutritious food'.*

4.4.2.3. African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child was adopted in 1990 and entered into force in 1999. This instrument defines a child as every human being below the age of 18 years.[632] A Committee of Experts on the Rights and Welfare of the Child (hereinafter ACERWC) was established to promote and protect the rights enshrined in this Charter, monitor implementation and interpret the provision therein. The Charter also established a reporting procedure, where every state party shall submit to the Committee reports on the measures taken to give effect to the provisions of the Charter. The Committee may also receive communications from any person, group or non-governmental organisation recognised by the African Union.[633]

This Charter incorporates, inter alia, the rights to life, nationality, name, education, to rest and leisure, and to health. Additionally, the child shall be protected from all forms of economic exploitation, abuse and torture, harmful social and cultural practices, armed conflicts, apartheid and discrimination, sexual exploitation, drug abuse, trafficking and abduction. This Charter explicitly makes reference to access to drinking water. Article 14 on the right to health and health services, stipulates that *'States Parties to the present Charter shall undertake the full implementation of this right and in particular take measures: c) to ensure the provision of adequate nutrition and safe drinking water'.*

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, and the African Charter on the Rights and Welfare of the Child request states parties to take measures to ensure access to safe drinking water. It should be borne in mind that these two conventions, and therefore their respective rights, are restricted to two groups of people, children and women, and cannot be applied outside of that scope.

[632] African Charter on the Rights and Welfare of the Child, Article 2.
[633] African Charter on the Rights and Welfare of the Child, Articles 32, 42, 43 and 44.

4.5. Implementation of the right to water in regional human rights law

Each one of the three regional human rights system: the European, the Inter-American and the African have created regional bodies charged with the responsibility to monitor compliance of state parties. Hence, this section focuses on examining complaints made to the different regional bodies in relation to access to water. To do so, we will examine different cases according to each regional system. Therefore, with regards to the European system we will analyse cases presented before the ECtHR and the European Committee of Social Rights and the reports of the CPT. In relation to the Inter-American System we will examine cases brought before the IAComHR and the IACtHR. And concerning the African system we will scrutinise cases before the African Commission and the ACERWC.

4.5.1. Contentious procedures under regional human rights instruments

The regional human rights systems under study have established some contentious procedures, according to which individuals can present allegations concerning possible violation of human rights. It should be borne in mind that almost none of the regional human rights treaties make any explicit reference to access to drinking water, with the exception of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, and the African Charter on the Rights and Welfare of the Child. In what follows, we will analyse whether access to water has been recognised as a component or essential element of other human rights, in other words as a derivative right.

4.5.1.1. European human rights system

None of the three European human rights instruments make any explicit reference to access to water. Nevertheless, some of the bodies that are in charge of the promotion, prevention and protection of human rights embraced therein have declared the violation of certain human rights due to lack of access to safe drinking water.

4.5.1.1.1. Cruel inhumane or degrading treatment

The European Court of Human Rights (ECtHR) has recognised in different judgments that lack of access to water for detainees constitutes a breach of article 3 of the European Convention. The following cases show the position of the ECtHR. Article 3 of the European Convention on Human Rights stipulates:

> *'No one shall be subjected to torture or to inhuman or degrading treatment of punishment'.*

In *Ireland v The United Kingdom*[634] it was established that fourteen individuals were submitted to a form of 'interrogation in depth' which involved the combined application of five particular techniques. The techniques consisted of stress posture, hooding, subjection to noise, deprivation of sleep and deprivation of food and drinks.[635] According to the ECtHR the techniques were degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them, and possibly breaking their physical or moral resistance.[636] As a result, the ECtHR ruled that the use of the five techniques, which includes deprivation of drinking water, constituted a practice of inhuman treatment, which violates article 3 of the European Convention.

In another case, *Iacov Stanciu v Romania* the applicant complained about the conditions under which he was detained. He complained about severe overcrowding, insalubrious sanitary facilities, poor food quality, lack of hot and cold running water, lack of adequate activities, and excessive restrictions on out-of-cell time. In one of the prisons where the applicant was held, the water was muddy and full of impurities, unsuitable for drinking and even risky for washing. In theory, hot water was generally provided in schedule, access to shower was granted on a weekly basis, once or twice a week. In practice, however, because of overcrowding and the limited number of showers, access to them was limited.[637] When assessing whether there has been a violation of article 3 of the European Convention, the ECtHR reiterated that:

> *'Measures depriving a person of his liberty may often involve an inevitable element of suffering or humiliation. Nevertheless, the suffering and humiliation involved must not go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.*
>
> *In the context of prisoners, the Court has already emphasised in previous cases that a detained person does not, by the mere fact of his incarceration, lose the protection of his rights guaranteed by the Convention. On the contrary, persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Under Article 3 the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured'.*[638]

[634] *Ireland v The United Kingdom* (App no 5310/71) ECtHR 18 January 1978.
[635] *Ireland v The United Kingdom* (App no 5310/71) ECtHR 18 January 1978, para 96.
[636] *Ireland v The United Kingdom* (App no 5310/71) ECtHR 18 January 1978, para 166.
[637] *Iacov Stanciu v Romania* (App no 35972/05) ECtHR 24 July 2012, paras 152-153.
[638] *Iacov Stanciu v Romania* (App no 35972/05) ECtHR 24 July 2012, para 166.

In addition to the overcrowding conditions, the ECtHR found that the applicant also experienced the following conditions: poor sanitary facilities, such as limited number of toilets and sinks for a large number of detainees, toilets in cells with no water supply, sinks in cells providing only cold water for a wide range of needs (personal hygiene, washing clothing and personal objects, cleaning the toilets), limited access to showers providing hot water, and poor quality food.[639] The ECtHR stated that even though in the present case there was no indication of a positive intention to humiliate or debase the applicant, the ECtHR considered that the distress and hardship the applicant endured exceeded the unavoidable level of suffering inherent in detention and went beyond the threshold of severity under Article 3 of the European Convention, therefore, breaching the prohibition to inhuman treatment.[640]

In a different case, *Onaca v Romania*[641], the ECtHR does not only guarantee access to water, it also considers lack of access to warm water for personal hygiene as an important element to avoid the violation of inhuman treatment. It is important to keep in mind that the right to water is not only about access to water for drinking purposes, but also for the satisfaction of other basic human needs, such as personal hygiene and washing of clothing. The ECtHR asserts that the '*the applicant was deprived of the opportunity to maintain adequate physical hygiene in prison since hot water was available only once a week for all six detainees*'.[642] The ECtHR concludes that although in the present case there is no proof that there was a positive intention to humiliate or debase the applicant, the fact that he was deprived of the opportunity to maintain physical hygiene and use the sanitary and other facilities in a restricted space with other detainees, was sufficient to cause distress of hardship of an intensity exceeding the unavoidable level of suffering inherent in detention, therefore, violating article 3 of the Convention.

Furthermore, in the case of *M.S.S v Belgium and Greece*[643], the applicant, an asylum seeker was submitted to degrading treatment, since in the place where he was held he did not have access to drinking water. There was a water fountain located outside the cell. However, the applicant was rarely unlocked therefore not being able to reach the water fountain, and therefore he was obliged to drink water from the toilets. The ECtHR found that the conditions in which the applicant was held amounted to degrading treatment within the meaning of Article 3 of the Convention.[644]

Thus, it can be said that according to the jurisprudence of the ECtHR the right to water can derive from the prohibition of torture, or to inhuman or degrading treatment or punishment, embraced in article 3 of the European Convention on Human Rights.

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[639] *Iacov Stanciu v Romania* (App no 35972/05) ECtHR 24 July 2012, para 175.
[640] *Iacov Stanciu v Romania* (App no 35972/05) ECtHR 24 July 2012, para 179.
[641] *Onaca v Romania* (App no 22661/06) ECtHR 13 March 2012
[642] *Onaca v Romania* (App no 22661/06) ECtHR 13 March 2012, para 42.
[643] *M.S.S v Belgium and Greece* (app no 30696/09) ECtHR 21 January 2011
[644] *M.S.S v Belgium and Greece* (app no 30696/09) ECtHR 21 January 2011, paras 230, 231, 234.

The CPT also deals with a similar provision, with the purpose of protecting individuals from inhumane or degrading treatment. The CPT states that ill-treatment can take numerous forms, many of which may not be deliberate but rather the result of organisational failing or inadequate resources.[645] Therefore, the CPT needs to consider whether physical conditions of detention, health care and standards of hygiene could degenerate into ill-treatment.[646] Overall quality of life is very important for this Committee. The CPT in its yearly reports describes the minimum conditions that individuals should have during detention or prison. In its yearly reports the CPT has mentioned access to water as part of those minimum conditions.

The CPT has stated that during police custody, which is of relatively short duration, the condition of detention in police cells must meet certain basic requirements, including access to proper toilet facilities under decent conditions, adequate means to wash themselves, as well as access to drinking water.[647] Concerning prisons, the CPT states that prisoners should have adequate access to shower or bathing facilities; and that it is also desirable to have running water available within cellular accommodation.[648] One can conclude that the reports of the CPT are in line with the judgments adopted by the ECtHR, since both understand that lack of access to drinking water for detainees and prisoners constitutes ill-treatment.

4.5.1.1.2. Right to respect for private and family life

The European Convention on Human Rights embraces in its article 8 the right to respect for private and family life which states that:

> *'1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of a disorder or*

[645] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, '2nd General Report' [CPT/Inf (92) 3], para 44 <http://www.cpt.coe.int/en/annual/rep-02.htm> accessed 18 August 2013.
[646] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, '2nd General Report' [CPT/Inf (92) 3], para 35 <http://www.cpt.coe.int/en/annual/rep-02.htm> accessed 18 August 2013.
[647] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, '12th General Report' [CPT/Inf (2002) 15], para 47 <http://www.cpt.coe.int/en/annual/rep-12.htm>. See also European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 'CPT Standards' [PCT/Inf/E (2002) 1-Rev -2011] 13 <http://www.cpt.coe.int/en/documents/eng-standards.pdf> accessed 18 August 2013.
[648] European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, '2nd General Report' [CPT/Inf (92) 3], para 49 <http://www.cpt.coe.int/en/annual/rep-02.htm> accessed 18 August 2013.

crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

The following cases show how according to the ECtHR, contamination of water, normally used for drinking purposes may violate the right to respect for private and family life.

In the case *Dubetska and others v Ukraine*[649], two different families filed an application against the state of Ukraine before the ECtHR, alleging violation of article 8 since the state authorities had failed to protect their home, private and family life from excessive pollution generated by two state-owned industrial facilities, a coal mining and a processing coal factory. During the proceedings a number of studies proved that the operations of the two facilities had adverse environmental effects. For instance, heavy metals from mining penetrated the soil and groundwater. The well water was contaminated with mercury and cadmium, exceeding domestic safety standards twenty-five-fold and fourfold respectively. In this case the applicants alleged persistent difficulties in accessing non-contaminated water; thus, suffering from a lack of drinkable water. The applicants further stated that from 2003 the state owned company at that time had been bringing, at its own expenses, drinkable water by truck and tractor. However, this water was not provided in sufficient quantity or regularly. Before this time there was no available drinkable water. The applicants contended that where they live they had no access to pipe water supply until 2009. Using the local well and stream water for washing and cooking purposes caused itching and intestinal infections.

Concerning the applicability of article 8 in the present case, the ECtHR declared that neither this article nor any other provision in the Convention guarantees the right to preservation of the natural environment as such. Nevertheless, an arguable claim under this article may arise where an environmental hazard attains a level of severity resulting in significant impairment of an individual's ability to enjoy his home, private or family life.[650] This means that the right to a healthy environment, although not explicitly incorporated in the European Convention, is interpreted as being implicit in article 8 of this Convention.

The ECtHR noted that for a period exceeding twelve years, the applicants were living permanently in an area which was unsafe for residential use on account of air and water pollution, as well as soil subsidence resulting from the operation of two state-owned industrial facilities. Before the construction of the aqueduct, which seems to have solved the problem of drinking water supply, there were delays in the supply of potable water, which resulted in considerable difficulties for the applicants. Therefore, it cannot be said that the applicants have been duly protected from the environmental risks

[649] *Dubetska and others v Ukraine* (App no 30499/03) ECtHR 10 February 2011
[650] *Dubetska and others v Ukraine* (App no 30499/03) ECtHR 10 February 2011, para 105.

emanating from the factory operation.[651] Under these circumstances the ECtHR declared that the environmental nuisance complained about attained the level of severity necessary to bring the complaint within the ambit of article 8 of the Convention.[652] After considering all the facts of the case, the ECtHR ruled that there was a breach of article 8 of the European Convention.

Lack of access to non-contaminated water for human consumption is one of the main circumstances considered by the ECtHR to establish that there was a violation of article 8 of the Convention, since the applicants were not protected from the environmental risks originated from the factory operations. From this case it can be concluded that the right to access to safe drinking water has been safeguarded as part of the right to a healthy environment (which based on well-established case law is implicit in article 8 of the European Convention). In other words, this is the case of a subordinate right that derives from a right that is implicit in another right.

Similarly, the case *Taskin and others v Turkey*[653] is about environmental contamination. The case concerns the granting of permits, issued by Turkish authorities, to operate a gold mine in Ovacik. The applicants alleged that they had suffered and continue to suffer the effects of environmental damage.[654] Based on the facts of the case, the applicants who live in the surrounding areas of the gold mine of Ovacik and some other residents expressed their concern regarding the use of cyanide leaching in the gold extraction process with the risk of contamination of the groundwater and destruction of the local flora and fauna, as well as the risk posed to human health and safety by the extraction method. This concern was raised during the public meeting that was part of the environmental impact report, and once more before the Administrative Court of Izmir where a judicial review of the operation permit granted to the gold mine by the Ministry of Environment was requested. After this request was dismissed, the decision was appealed before the Supreme Administrative Court that overturned the lower court's judgment, concluding that the operating permit at issue did not serve the public interest and that the safety measures which the company had undertaken did not suffice to eliminate the risk involved in such activity. It was also mentioned that the region's inhabitants use the groundwater; and in the event of seepage, it could become polluted by toxic waste. A couple of years afterwards the Council of Ministers of Turkey adopted a decision stating that the gold mine of Ovacik could continue its activities; however, the decision was not made public.

When analysing the allegation of violation of article 8 of the European Convention, the ECtHR pointed out that article 8 applies to severe environmental pollution which may affect individual's well-being and prevent them from enjoying their homes in such a

[651] *Dubetska and others v Ukraine* (App no 30499/03) ECtHR 10 February 2011, paras 118, 152.
[652] *Dubetska and others v Ukraine* (App no 30499/03) ECtHR 10 February 2011, para 119
[653] *Taskin and Others v Tuerkey* (app no 46117/99) ECtHR 10 November 2004.
[654] *Taskin and Others v Tuerkey* (app no 46117/99) ECtHR 10 November 2004, paras 4, 13.

way as to affect their private and family life adversely. The ECtHR stated that *'[t]he same is true where the dangerous effects of an activity to which the individuals concerned are likely to be exposed have been determined as part of an environmental impact assessment procedure in such a way as to established a sufficiently close link with private and family life for the purpose of Article 8 of the Convention. If this were not the case, the positive obligation on the State to take reasonable and appropriate measures to secure the applicants' rights under paragraph 1 of the Article 8 would be set at naught'.*[655]

The ECtHR pointed out that the authorities' decision to issue an operating permit for the Ovacik gold mine was annulled by the Supreme Administrative Court, which based its decision on the applicants' effective enjoyment of the right to life and the right to a healthy environment. The ECtHR concluded that the permit did not serve the public interest and that the impact assessment and other reports had outlined the danger of the use of sodium cyanide for the local ecosystem, human health and safety. In addition, there was a lack of compliance with the final decision of the Administrative Court. The ECtHR asserted that in cases raising environmental issues the state must be allowed a wide margin of appreciation, respecting all substantive and procedure guarantees available to the citizens. In this case the ECtHR declared that the authorities deprived the applicants of the available procedural guarantees since the decision of the Council of Ministers of Turkey that authorised the continuation of the production in the gold mine was not made public.[656] Consequently, the ECtHR found that the respondent state did not fulfil its obligation to secure the applicants' right to respect for their private and family life, in breach of article 8 the Convention.

In the present case the ECtHR is of the view that the state is under the positive obligation to take reasonable and appropriate measures to secure that likely dangerous effects of an activity, which have been determined as part of an environmental impact assessment, do not affect the right to private and family life. There is an obligation for the state to protect individuals against environmental pollution. In this case the particular concern is the contamination of groundwater by toxic waste, including cyanide, mainly because groundwater is used by the inhabitants of the region. Therefore, the state is under the obligation to prevent the contamination of this vital resource. The present decision is in line with the General Comment 15 of the CESCR on the right to water, since the latter states that as part of the right to water individuals should be free from interference, such as contamination of water supply. Similarly, the decision of the ECtHR is trying to prevent the contamination of the water that is used by the inhabitants of the region. It should be borne in mind that this is not a case of actual water contamination, but about a potential contamination, that if happened would have long

[655] *Taskin and Others v Tuerkey* (app no 46117/99) ECtHR 10 November 2004, para 113.
[656] *Taskin and Others v Tuerkey* (app no 46117/99) ECtHR 10 November 2004, paras 116, 125-126.

lasting effects for about twenty to fifty years.[657] For the ECtHR it is important to ensure that both substantive and procedural rights are properly implemented to fully protect human rights. Once more the right to respect for private and family life, from which the right to a healthy environment is derived, is used to protect water resources for human consumption and, therefore indirectly protects the right to water.

In the *Tătar v Romania*[658] case, the applicants alleged that the technology process used by the Company Aurul S.A for mining gold and silver using cyanide was dangerous to their lives. On 30 January 2000 a large quantity of polluted water containing sodium cyanide and other substances was leaked into various rivers and travelled 800 kilometres in 14 days crossing several borders, polluting also drinking water sources. The accident had a significant impact on environment and socio-economic activities. In December of the same year the Commissioner for the Environment of the European Union requested to the Task Force to write a report. According to the Task Force water sources in the region were contaminated, but it informed that the water provider authority supplied potable water to the inhabitants.[659]

The ECtHR observed that there is information from different doctors, engineers, biologists among others that reported that the activity in question was not safe for the environment and human health. The ECtHR declared that article 8 is applicable in cases of environmental pollution caused directly by the state or when the responsibility of the latter derives from lack of adequate regulation of the activity of a private actor. In fact, the state has the negative obligation to abstain from arbitrary interfering in the exercise of the rights of individuals, and the positive obligation to take all the reasonable and appropriate measures to effectively protect the rights of individuals, in this case environmental and human health. The ECtHR decided that Romania failed in its obligation to adequately assess the potential risk of the mining activity and to take the adequate measures to guarantee the applicants the right to respect to their private and family life within the meaning of article 8.[660]

4.5.1.1.3. Right to fair trial (right to property)

The European Convention enshrined in its article 6 the right to fair trial, which reads as follows:

> *'1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order*

[657] *Taskin and Others v Tuerkey* (app no 46117/99) ECtHR 10 November 2004, para 26.
[658] *Tătar v Romania* (app no 67021/01) ECtHR 27 January 2009.
[659] *Tătar v Romania* (app no 67021/01) ECtHR 27 January 2009, para 29.
[660] *Tătar v Romania* (app no 67021/01) ECtHR 27 January 2009, paras 87, 88, 91, 112, 125.

or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so requires, or to the extend strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice.

2. Everyone charge with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charge with a criminal offence has the following minimum rights: a) to be informed promptly, in a language which he understand and in detail, of the nature and cause of the accusation against him; b) to have adequate time and facilities for the preparation of his defence; c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court'.

In the case *Zander v Sweden*[661], the applicants alleged a violation of article 6 of the European Convention, since they could not seek judicial review of a Government decision upholding a decision regarding an environmental permit granted to a company treating household and industrial waste. The applicants own a property adjacent to land, which a company uses for treating waste. In 1979 it was discovered that refuse containing cyanide had been left on the dump site and analyses of drinking water emanating from a nearby well had shown excessive levels of cyanide in the water. Therefore, the local Health Care Board had prohibited the use of that water and had provisionally supplied municipal drinking water to the property owner dependent on the well. In July 1983 the company obtained its environmental permit. In October the same year further analyses showed excessive levels of cyanide in six other wells near the dump, one of which was on the applicants' property. As a result, the use of the water from these wells was prohibited and the landowners concerned, including the applicants were temporarily provided with municipal drinking water. However, in 1984 the National Food Agency recommended that the maximum permitted level of cyanide be raised from 0.01 mg to 0.1 mg per litre. As a result, the municipality stopped providing the affected landowners with water. When the company renewed its permit in 1986, it was also allowed to expand its activities on the dump. Consequently, the nearby landowners, including the applicants, demanded that the permit was not granted without an obligation, by way of precautionary measure, to supply drinking water free of charge to the owners concerned as the proposed activity entail and would continue to entail a

[661] *Zander v Sweden* (app no 14282/88) ECtHR 25 November 1993.

risk of polluting their water. Their demands were dismissed on the ground that there was not likely a water connection between the dump and the wells. The landowners appealed the decision to the Government, as the final instance of appeal, which upheld the decision and dismissed the appeal.

When the ECtHR analysed the alleged violation of article 6 of the Convention, it had first to determine whether there was a dispute over a 'right', at least recognised under domestic law. Since article 6 of the Convention provides that in the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing by an independent and impartial tribunal. It was important to determine whether the dispute in this case was over a civil right. The ECtHR affirmed that the dispute regarding the permit was decisive for the applicants' entitlement to protection against pollution of their well. Therefore, the appeal lodged by the applicants involved a determination of one of their rights for the purpose of article 6 paragraph 1 of the Convention. Regarding the second point the ECtHR noted that the applicants' claim was directly connected with their ability to use the water in their well for drinking purposes. This ability was one facet of their right as owners of the land in which the well was situated. The ECtHR stated that *'[t]he right to property is clearly a 'civil right' within the meaning of Article 6 para 1'*.[662] Therefore the ECtHR declared that the entitlement was a civil right, the right to property. The ECtHR deemed that since the landowners had the ability to use the wells located within their land for drinking purposes, access to this resource is understood as being part of the right to property. One could say that the right to water in this case is implicit in the right to property for those landowners that posses a water resource within their land and are allowed to use it for human consumption.

4.5.1.1.4. Right to housing

The right to housing is considered an economic, social and cultural right. As mentioned before, since the European Convention largerly focuses on civil and political rights,[663] this particular right is not found in this Convention. Instead the right to housing is enshrined in the European Social Charter (Revised). Article 31 states that:

> *'With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measure designed:*
>
> *1. to promote access to housing of an adequate standard;*
>
> *2 to prevent and reduce homelessness with a view to its gradual elimination;*

[662] *Zander v Sweden* (app no 14282/88) ECtHR 25 November 1993, para 27.
[663] Ilias Bantekas and Lutz Oette, International Human Rights Law and Practice (CUP, Cambridge 2013) 222.

3 to make the price of housing accessible to those without adequate resources'.

The European Committee of Social Rights has mentioned in a number of decisions based on the collective complaints procedure, as well as in the conclusions adopted as part of the reporting procedures that access to water is an essential element of the right to an adequate housing. It should be borne in mind that article 31 on the right to housing is one of the additional articles from which state parties may select to be bound.

In 2003, the European Committee of Social Rights stated in its conclusions that for the purpose of article 31§1 of the Charter the parties must define the notion of adequate housing in law. The Committee '*considers that 'adequate housing' means a dwelling which is structurally secure, safe from a sanitary and health point of view and not overcrowded, with secure tenure supported by the law*'. This means that '*a dwelling is safe from a sanitary and health point of view if it possesses all basic amenities, such as water, heating, waste disposal; sanitation facilities, electricity; etc and if specific dangers such as, for example, the presence of lead or asbestos are under control'.*[664]

In the complaint *FEANTSA v France*[665], the European Federation of National Organisations Working with Homeless asked the European Committee of Social Rights to find out whether France violated article 31 of the Revised European Social Charter on the ground that France does not ensure an effective right to housing for its residents, in particular since the measures to reduce the number of homeless people are insufficient, and a significant number of households live in poor housing conditions. The European Committee of Social Rights recalled that 'Article 31(1) of the Charter guarantees an adequate housing for everyone, which means a dwelling which is safe from a sanitary and health point of view, that is, possesses all basic amenities, such as water, heating, waste disposal, sanitation facilities and electricity; is structurally secure and not overcrowded'.[666] Based on the definition adopted by the Committee water and sanitation are essential elements of the right to an adequate housing.

In a complaint between the *Centre on Housing Rights and Evictions (COHRE) against Italy,*[667] the former alleged that the Roma and Sinti people were suffering from exclusion in all areas of life, and that the adoption of policies and laws by Italy, such as 'Pacts for Security' and the so called 'Nomad State of Emergency Decrees' constitute

[664] European Committee of Social Rights, Conclusions 2003 Vol. 1 (Bulgaria, France, Italia), Council of Europe September 2003, 221.
[665] *European Federation of National Organisations working with the Homeless (FEANTSA) v France* (Complaint No. 39/2006) European Committee of Social Rights, Decision on the Merits 5 December 2007.
[666] *European Federation of National Organisations working with the Homeless (FEANTSA) v France* (Complaint No. 39/2006) European Committee of Social Rights, Decision on the Merits 5 December 2007, para 76.
[667] *Centre on Housing Rights and Evictions (COHRE) v Italy* (Complaint No. 58/2009) European Committee of Social Rights, Decision of the Merits 25 June 2010.

deliberate retrogressive measure. Also the policy and practice of segregating Roma and Sinti families in 'ghettos' denies them access to legal status required to be entitled to social and family assistance, including access to adequate housing.[668] In this case, the European Committee of Social Rights underlined that in a previous decision,[669] it found that Italy was in breach of the Revised Charter by persisting with the practice of placing Roma in camps, and failing to take adequate steps to ensure that Roma people are offered housing of a sufficient quantity and quality to meet their particular needs.[670] Following, the Committee reiterates in its decision that adequate housing under article 31§1 means: '*a dwelling which is safe from a sanitary and health point of view, i.e. it must possess all basic amenities, such as water, heating, waste disposal, sanitation facilities and electricity and must also be structurally secure, not overcrowded and with secure tenure supported by the law'*.[671]

Another complaint was concerning Roma of Romanian and Bulgarian origin in France,[672] who were discriminated and evicted from illegal camps. The Committee affirmed that since the right to shelter is closely connected to the right to life and to the right to respect every person's human dignity, state parties are required to provide shelter to persons unlawfully present in their territory for as long as they are in their jurisdiction.[673] The Committee recalled that '*to ensure that the dignity of the persons sheltered is respected, shelter must meet health, safety and hygiene standards and, in particular be equipped with basic amenities such as access to water…*'[674]

In a different complaint, the European Roma Rights Centre (ERRC)[675] considered that the re-housing programmes in Portugal failed to integrate Roma and often resulted in spatial segregation and inadequately sized dwelling in areas with poor infrastructure and limited or no access to public services. It stated that Portugal has a positive obligation to improve the deplorable and constantly deteriorating housing conditions for Roma in informal settlements, where dwelling conditions often consist of unprotected concrete housing blocks. The Committee considered that the main issue at stake in the complaint

[668] *Centre on Housing Rights and Evictions (COHRE) v Italy* (Complaint No. 58/2009) European Committee of Social Rights, Decision of the Merits 25 June 2010, paras 43-46.
[669] *Centre on Housing Rights and Evictions (COHRE) v Italy* (Complaint No. 27/2004) European Committee of Social Rights, Decision on the merits 7 December 2005.
[670] *Centre on Housing Rights and Evictions (COHRE) v Italy* (Complaint No. 58/2009) European Committee of Social Rights, Decision of the Merits 25 June 2010, para 53.
[671] *Centre on Housing Rights and Evictions (COHRE) v Italy* (Complaint No. 58/2009) European Committee of Social Rights, Decision on the Merits 25 June 2010, para 54. See also *Defence for Children International (DCI) v the Netherlands* (complaint No. 47/2008) European Committee of Social Rights, Decision on the Merits October 20, 2009, para 43.
[672] *European Roma and Travellers Forum v. France* (Complaint No. 64/2011) European Committee of Social Rights, Decision on the merits 24 January 2012.
[673] *European Roma and Travellers Forum v. France* (Complaint No. 64/2011) European Committee of Social Rights, Decision on the merits 24 January 2012, para 126.
[674] *European Roma and Travellers Forum v. France* (Complaint No. 64/2011) European Committee of Social Rights, Decision on the merits 24 January 2012, para 127.
[675] *European Roma Rights Centre (EERC) v Portugal* (Complaint No. 61/2010) European Committee of Social Rights, Decision on the Merits 30 June 2011.

was related to the right to housing of an adequate standard, which falls under the scope of article 31§1 of the revised Charter. According to the facts, different Roma settlements lack access to water. For instance in the settlement of Marinha Grande, twenty four of the residents are minors and they lack hot water, electricity or sewage and the only public water sources was located approximately 100 metres from the tent camp. Similarly, the Settlement of Largo de Feira is deprived of water, electricity and adequate hygienic facilities and sewage. The settlement of Vindigueira was deprived of water for eight days following the destruction of the concrete taps. The Committee held that the notion of an adequate housing implied a dwelling which is safe from a sanitary and health point of view. This means that dwellings must have access to natural and common resources, namely safe drinking water, electricity, sanitation facilities and waste disposal.[676] Also the Committee declared that *'the right to adequate housing includes a right to fresh water sources. The restriction of water could have serious consequences for the life and health for the persons affected. Therefore, States Parties are required, under Article 31§1 of the Revised Charter to ensure that Roma settlements have access to safe drinking water'.*[677] In light of the above the European Committee on Social Rights asserted that there has been a breach of Article E, concerning non-discrimination, taking in conjunction with Article 31§1 of the European Social Charter.

In previous cases the European Committee of Social Rights clearly stated that water is a basic amenity that needs to be provided to guarantee the right to an adequate housing and the obligation to provide shelter. However, in this case, the Committee gave a higher category to water, since it explicitly declares that the right to adequate housing includes the right to fresh water sources. According to the studied decisions access to water evolved from being a basic amenity to become a right.

4.5.1.2. Inter-American human rights system

As a matter of fact neither the American Declaration of the Rights and Duties of Man or the American Convention on Human Rights has explicitly referred to access to water. Nevertheless, the IACtHR and the IAComHR have recognised the importance of having access to water for human consumption. So far, there are two different situations according to the IACtHR in which access to water must be guaranteed to prevent violation of human rights. The first one is related to the conditions given in detention or in prison. The second is related to indigenous people in special vulnerable conditions (special risk to their right to life, real and immediate)[678]. The IAComHR has also found

[676] *European Roma Rights Centre (EERC) v Portugal* (Complaint No. 61/2010) European Committee of Social Rights, Decision on the Merits 30 June 2011, para 31.
[677] *European Roma Rights Centre (EERC) v Portugal* (Complaint No. 61/2010) European Committee of Social Rights, Decision on the Merits 30 June 2011, para 36.
[678] Inter-American Court of Human Rights, 'Annual Report of the Inter-American Court of Human Rights 2010' (Organization of American States and Inter-American Court of Human Rights, Costa Rica 2011) 61

that access to water resources may affect certain human rights like the right to humane treatment (article XXV) embedded in the American Declaration of human rights. Following cases from these two bodies are examined.

4.5.1.2.1. Cruel inhuman or degrading treatment

The IACtHR has declared that state parties are under the obligation to provide individuals with all the basic conditions compatible with human dignity when they are under their custody. Article 5 of the American Convention stipulates that:

> *1. Every person has the right to have his physical, mental and moral integrity respected.*
>
> *2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.*
>
> *3. Punishment shall not be extended to any person other than the criminal.*
>
> *4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted person.*
>
> *5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialised tribunals, as speedily as possible, so that they may be treated in accordance with their statues as minors.*
>
> *6 Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.*

The following cases depict the position of the IACtHR regarding the right to access water for individuals that are in detention or in prison.

The case, *López Álvarez v Honduras*, is one of the earliest cases where the IACtHR started to mention the importance of water. Mr. López was imprisoned for six year and four months in the criminal centres of Tela and Támara, in Honduras. He remained detained along with already convicted persons, while he was being prosecuted, in overcrowded and unhealthy prison conditions.[679] It was proven that during the detention Mr. López was living in a reduced cell inhabited by numerous inmates. He had to sleep on the floor for a long period of time and he did not receive an adequate diet or drinking water, nor did he have essential hygiene conditions.[680] The Court analysed the situation in which Mr. López was detained and stated that the '*State is the guarantor of the rights*

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and 65. <http://www.corteidh.or.cr/informes.cfm>. The new website of the IACtHR is http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2010.pdf

[679] *López Álvarez v Honduras*, IACtHR, Judgment of 1 February 2006, para 54(51).

[680] *López Álvarez v Honduras*, IACtHR, Judgment of 1 February 2006, para 108.

of the detainees, and it must offer them life conditions compatible with their dignity'.[681] The IACtHR recalled case-law of the ECtHR[682] where the latter Court stated that based on article 3 of the European Convention on Human Rights (prohibition of torture) the state must ensure that a person is detained in conditions which are compatible with respect for his human dignity. Additionally, that the manner and method of the execution of the measure do not subject him to distress or anguish of an intensity exceeding the unavoidable level of suffering inherent to detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things providing him the requisite medical assistance.[683] Due to the bad conditions in which Mr López was detained, the IACtHR concluded that Mr. López was not treated with due respect for his human dignity and that the state did not comply with the duties that corresponded to it in its position of guarantor of the rights of the detainees. In this case, lack of access to drinking water for the detainee was one of the elements that the IACtHR considered to conclude that there was a violation of the right to human treatment, enshrined in Articles 5 (1), (2) and (4) of the American Convention.

In another case *Vélez Loor v Panama*, the IACtHR unequivocally expressed that access to drinking water is a minimum condition that a state needs to guarantee when an individual is deprived of his or her liberty,[684] otherwise the state will be violating the right to human treatment embraced in the American Convention. Mr Vélez Loor, an Ecuadorian national, was arrested in the Republic of Panamá and prosecuted for crimes related to his immigration status. He suffered inhumane detention conditions at various Panamanian prisons in which he was held before his deportation to Ecuador.[685] It was proven and acknowledged by Panamá that there were serious deficiencies in the national prison system. In the prisons where Mr Veléz Loor was placed, the following problems existed: structural deficiencies in the detention centres, problems in the provision of water supply, overcrowding, and deficiency of the system to classify prisoners, among others.[686] Concerning this situation the IACtHR held, that:

> '*in the terms of Article 5(1) and 5(2) of the Convention, every person deprived of her or his liberty has the right to live in detention conditions compatible with her or his personal dignity. Consequently, since the State is the institution responsible for detention establishments, it is the guarantor of the rights of the prisoner. This implies the State's duty to guarantee the health and welfare of inmates by providing them, among other things, with the required medical care, and it must also ensure that the manner and method of any deprivation of liberty do not exceed the unavoidable level of suffering inherent to*

[681] *López Álvarez v Honduras*, IACtHR, Judgment of 1 February 2006, para 106.
[682] *Kudła v Poland* (App no 30210/96) ECtHR 26 October 2000, para 94.
[683] *López Álvarez v Honduras*, IACtHR, Judgment of 1 February 2006, para 106.
[684] *Vélez Loor v Panamá*, IACtHR, judgment of 23 November 2010, para 215-216
[685] *Vélez Loor v Panamá*, IACtHR, judgment of 23 November 2010, para 2.
[686] *Velez Loor v Panama*, IACtHR, Judgment of 23 November 2010, para 197.

detention. Lack of compliance therewith may constitute a violation of the absolute prohibition against torture and cruel, inhumane, or degrading punishment or treatment. In this sense, the States cannot invoke economic hardship to justify imprisonment conditions that do not comply with the minimum international standards and respect the inherent dignity of the human being'.[687]

In this case, the IACtHR cited international standards and General Comment 15 to emphasise the obligations of states to provide sufficient amounts of clean water for personal consumption and hygiene for detainees and prisoners. The IACtHR noted that:

'drinking water is a particular important aspect of the prison conditions. In relation to the right to drinking water the United Nations Committee on Economic, Social and Cultural Rights mentioned that States Parties must adopt measures to ensure that '[p]risoners and detainees are provided with sufficient and safe water for their daily individuals requirements, taking note of the requirements of international humanitarian law and the United Nations Standard Minimum Rules for the Treatment of Prisoners'. Furthermore, the Minimum Rules establish that '[p]risoners shall be required to keep their persons clean, and to this end they shall be provided with water and with toilets as are necessary for health and cleanliness' as well as '[d]rinking water shall be available to every prisoner whenever needed'. In consequence, States must take steps to ensure that prisoners have sufficient safe water for daily personal needs, among them, the consumption of drinking water whenever they require it, as well as for personal hygiene'.[688]

Regarding the conditions given in prison, the IACtHR declared that:

'*the absence of minimum conditions that ensure the supply of drinking water within a penitentiary centre constitutes a serious failure of the State's duty to guarantee the rights of those held in the State's custody, given that due to the particular circumstances of any deprivation of liberty, detainees cannot satisfy their personal basic needs by themselves, though said needs are essential for the basic development of a dignified life, such as access to sufficient safe water'.*[689]

States are under the obligation to provide individuals with all the basic conditions to enjoy a dignified life, mainly because they are under state custody, which impedes them to satisfy their basic needs by themselves. In this case, the IACtHR recognised that lack of compliance with the minimum imprisonment conditions, which includes access to water for personal hygiene and consumption, constitute a violation of the absolute

[687] *Velez Loor v Panama*, IACtHR, Judgment of 23 November 2010, para 198.
[688] *Velez Loor v Panama*, IACtHR, Judgment of 23 November 2010, para 215.
[689] *Velez Loor v Panama*, IACtHR, Judgment of 23 November 2010, para 216.

prohibition against torture, and cruel, inhumane, or degrading punishment or treatment. This means that the human right to water derives from the right to human treatment, enshrined in article 5 of the American Convention. Concerning the characteristics of the water, the IACtHR affirmed that states need to take the necessary measures to guarantee access to water that is *safe* and *sufficient* to satisfy the basic daily needs of each individual.[690] However, the IACtHR did not indicate, at any point, the minimum amount of drinking water that should be guaranteed to individuals deprived of their liberty to satisfy their basic needs, including, consumption of drinking water and personal hygiene.

In a more recent case, *Pacheco Teruel et al.* v. *Honduras*,[691] the IACtHR examined the international responsibility of Honduras for the death of 107 prisoners as a result of a fire that originated in their cell, as well as the condition in which they lived during imprisonment. The deceased were members of a gang who were kept in a special cell, in 'cell No. 19', separated from other inmates of the prison, and confined in deplorable, unsafe and unhygienic conditions. The cell was overcrowded, the physical space for each inmate was approximately one square meter; there was lack of privacy, and lack of ventilation. The available tap water was inadequate, at the time of the facts, there was no running water. Consequently, the latrines had to be filled with buckets; there were no washbasins or shower and no articles for personal hygiene were provided, which gave rise to an unhealthy and unhygienic environment and infestations of insects.[692] Honduras recognised its responsibility in relation to the violation of the right to life. The IACtHR examined, in accordance with Article 5 (1)(2) of the American Convention, whether detention conditions where compatible with the dignity of the persons deprived of liberty. The IACtHR declared in its judgment that in previous case-law it has incorporated the main standards for prison conditions. The IACtHR listed eleven standards; among them it established that all individuals deprived of their liberty must have access to drinking water for personal consumption and personal hygiene; lack of access to drinking water constitutes grave negligence of the state in its duties as guarantor to the rights of those under its custody.[693] Based on the listed standards the IACtHR ruled that the state of Honduras failed to comply with the obligation to guarantee detention conditions compatible with human dignity, consequently violating Article 5 ACHR.[694]

From the previous three cases it is possible to see an evolution through the jurisprudence of the IACtHR. In the first case the IACtHR affirms that the state is the guarantor of the right of the detainees and prisoners since they are under its custody, and therefore, must offer them life conditions compatible with their dignity. In the second case of study the IACtHR specified that one of the minimum conditions that a state

[690] *Velez Loor v Panama*, IACtHR, Judgment of 23 November 2010, para 216.
[691] *Pacheco Teruel et al. v Honduras*, IACtHR, Judgment of 27 April 2012.
[692] *Pacheco Teruel et al. v Honduras*, IACtHR, Judgment of 27 April 2012, paras 36-40.
[693] *Pacheco Teruel et al. v Honduras*, IACtHR, Judgment of 27 April 2012, para 67(c).
[694] *Pacheco Teruel et al. v Honduras*, IACtHR, Judgment of 27 April 2012, para 69.

needs to guarantee when an individual is deprived of his or her liberty is access to drinking water. The IACtHR also declared that water provided for prisoners needs to be *sufficient* to satisfy the basic daily needs of each individual, and must be *safe*. In the last case the IACtHR compiled different standards mentioned in previous case-law and adopt a non-exhaustive list of benchmarks to guarantee prison conditions compatible with human dignity. Therein the Court listed eleven minimum conditions, including the obligation to provide access to drinking water for personal consumption and hygiene. [695] In addition, the IACtHR established that states cannot claim financial difficulties to justify detention conditions that do not comply with the relevant minimum international standards and fail to respect the inherent dignity of the human being.[696] In other words, even countries with limited economic resources are under the obligation to comply with the minimum prison conditions, including the provision of sufficient safe water.

The following cases depict the position of the IAComHR regarding the right to access water for individuals that are in detention or in prison.

The IAComHR has also had the opportunity to analyse cases where lack of access to drinking water is alledged as poor detention conditions. The first case concerns the application of the American Convention and a second case analyses the application of the American Declaration of the Rights and Duties of Man. In the first case, *Whitley Myrie v Jamaica*[697] the petition stated that Jamaica[698] violated Mr. Myrie's rights because of his bad conditions during detention. In the petition it was alleged that Mr. Myrie was subjected to difficult detention conditions, such as the size and conditions of his cell, lack of proper medical treatment, poor sanitation, and inadequate and unhygienic food and water. In addition, he was denied access to regular exercises and did not have access to educational reading materials. The IAComHR evaluated whether the conditions of detention amount to violation of the obligations under the American Convention, particularly regarding article 5.

The IAComHR stated that '*a comparison of Mr. Myrie's prison conditions with international standards for the treatment of prisoners also suggests that his treatment has failed to respect minimum requirements of human treatment. In particular, Rules 10, 11, 12, 15 and 21 of the United Nations Standards Minimum Rules for the Treatment of Prisoners, which the Commission has previously indicated provide reliable benchmark as to minimum international standards for the human treatment of prisoners*'.[699] Rule 15 of the UN Standards Minimum Rules for the Treatment of Prisoners states that

[695] *Pacheco Teruel et al. v Honduras*, IACtHR, Judgment of 27 April 2012, para 67.
[696] *Pacheco Teruel et al. v Honduras*, IACtHR, Judgment of 27 April 2012, para 67(j).
[697] *Whitley Myrie v Jamaica*, IAComHR, Report 41/04 (case 12.417) 12 October 2004.
[698] Jamaica ratified the American Convention on Human Rights, on 19 July 1978, when doing so it recognised the competence of the Inter-American Commission to receive and examine communications regarding possible violations of human rights. Jamaica has not recognised the jurisdiction of the Inter-American Court of Human Rights.
[699] *Whitley Myrie v Jamaica* IAComHR, Report 41/04 (case 12.417) 12 October 2004, para 45.

prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with toiletry necessary for health and cleanliness. In this case the IAComHR concluded that it is evident that the state failed to satisfy these international minimum standards of prison conditions. The IAComHR ruled that the conditions of detention constitute cruel, inhuman or degrading treatment or punishment, violating article 5 of the American Convention.

In another case the IAComHR examines, based on the jurisdiction granted by the Charter of the OAS, whether lack of access to drinking water violates the rights to human treatment embraced in article XXV of the American Declaration of the Rights and Duties of Man, which states:

> *'No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law.*
>
> *No person may be deprived of liberty for non-fulfilment of obligations of a purely civil character.*
>
> *Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.*

In the case *Oscar Elias Biscet et al v Cuba*[700] the petitioners alleged that during detention some of them were held without clean drinking water[701] or light, and that medical care was denied. In some cases family visits or other communications were restricted. When the IAComHR analysed compliance with article XXV on the right to human treatment of the American Declaration, it considered that the responsibility of the state with regard to the integrity of the persons in its custody is not limited to the negative obligation of abstaining from torturing or mistreating such persons. Therefore, since prisons are places where the state has total control over the lives of the inmates, the state has the obligation to protect those individuals. The IAComHR recalled that the IACtHR has reaffirmed that states have the duty to guarantee to detainees the right to personal integrity and to live in custody in conditions compatible with their personal dignity.[702] The IAComHR also recalled that the United Nation's Standard Minimum Rules for the Treatment of Prisoners states that drinking water shall be available to every prisoner whenever he needs it.[703] In this case the IAComHR ruled that some of the alleged victims have been subjected to inhuman and degrading treatment, and

[700] *Oscar Elias Biscet et al v Cuba,* IAComHR, Report 67/06 (case 12.476) 21 October 2006. Cuba is not a party to the American Convention.
[701] *Oscar Elias Biscet et al v Cuba,* IAComHR, Report 67/06 (case 12.476) 21 October 2006, paras 62, 117, 124
[702] *Oscar Elias Biscet et al v Cuba,* IAComHR, Report 67/06 (case 12.476) 21 October 2006, para 150
[703] *Oscar Elias Biscet et al v Cuba,* IAComHR, Report 67/06 (case 12.476) 21 October 2006, para 152.

therefore, the state violated the right to human treatment during deprivation of liberty, recognised in article XXV of the American Declaration.[704]

As part of the main function of promoting the observance and protection of human rights in the Americas the IAComHR prepares and publishes reports on specific issues. In 2012 the IAComHR published a Report on the Human Rights of Persons Deprived of Liberty in the Americas. Therein the IAComHR recalls the minimum amounts of water established by the ICRC that a person requires for survival (3 to 5 litres per day). The IAComHR states that this minimum amount may be higher based on climate conditions and on the physical exercise performed by the inmates. The IAComHR affirms that the minimum requirement per detainee/prisoner to meet all of his or her needs is between 10 to 15 litres of water per day, provided that sanitary installations are working properly. Moreover, the IAComHR states that the minimum amount of water that inmates should be able to store inside their cells is 2 litres per person per day, if they are confined for periods of up to 16 hours, and between 3 to 5 litres per person per day, if they are confined for more than 16 hours or if the climate is hot.[705]

4.5.1.2.2. Right to life

The IACtHR has declared that states are under the obligation to provide basic services such as access to and quality of water, food, health services and education to landless indigenous people who are under special vulnerable conditions, particularly under a real and immediate risk to life.[706]

The American Convention on Human Rights enshrined the right to life in article 1:

> *'1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.*
>
> *2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.*

[704] *Oscar Elias Biscet et al v Cuba*, IAComHR, Report 67/06 (case 12.476) 21 October 2006, paras 151, 157-158.
[705] Inter-American Commission on Human Rights, Report on the Human Rights of Persons Deprived of Liberty in the Americas', OEA/Ser.L/V/II. Doc 64, 31 December 2011, para 483 <http://www.oas.org/es/cidh/ppl/docs/pdf/PPL2011esp.pdf> 24 September 2013.
[706] IACtHR, 'Annual Report of the Inter-American Court of Human Rights 2010' (Organization of American States and Inter-American Court of Human Rights, San Jose 2011) 65.

3. The death penalty shall not be re-established in states that have abolished it.

4. In no case shall capital punishment be inflicted for political offenses or related common crimes.

5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.

6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority'.

The cases analysed here concern three different indigenous communities (Yakye Axa, Sawhoyamaxa and Xákmok Kásek) claiming the ownership and possession of their ancestral lands, which is now privately owned, in order for them to move back into the said lands and continue with their traditional subsisting activities. The three cases were brought against the state of Paraguay.

The land ownership problem for these and other communities started at the end of the 19th century, when vast pieces of land in the Paraguayan Chaco were acquired by British businessmen, through the London Stock Exchange, as a consequence of a debt owed by Paraguay. The division and sale of such territories were made while their inhabitants, exclusively Indians, were kept ignorant of the facts.[707] The new owners of those lands introduced different economic activities, which implicated the restriction of the mobility of the indigenous communities as well as considerable changes in their subsistence activities. This situation has worsened in the last decades. As a result, the indigenous communities Yakye Axa, Sawhoyamaxa and Xákmok Kásek in the years 1993, 1991, and 1990 respectively, took the necessary steps to start legal claims at the national level for the lands that they consider their traditional habitat. A few years later, members of the communities Yakye Axa and Sawhoyamaxa, decided to return to the lands claimed as part of their ancestral territories, while waiting for a ruling on their cases. However, they were not allowed to enter said lands, for which reason they decided to settle alongside public roads bordering what they claim their ancestral lands.

In those settlements, members of the communities Yakye Axa and Sawhoyamaxa live in extreme conditions. They cannot cultivate or practice their traditional subsistence activities (hunting wild animals, fishing, and gathering fruits, among others) and they do not have minimum basic services. The members of the communities do not have access to clean water and the most reliable source is water collected during rainfall. The water they regularly use comes from deposits located in the lands they claim. However, it is

[707] *Indigenous Community Sawhoyamaxa v Paraguay*, IACtHR, Judgment of 29 March 2006, para 73(1).

used both for human consumption and for personal hygiene and it is not protected from animal contact.[708] Likewise, the Xákmok Kásek community, although located in a piece of land close to the one they claim, is also living in precarious conditions since they are also deprived of access to their traditional means of subsistence. Moreover, this community is located in a forest area with no access to water.[709] As a result of those extreme conditions and lack of access to their traditional medicine or medical care, some members of these communities are sick and others have died in precarious conditions.

After exhausting the respective procedure before the IAComHR, the latter brought the cases before the IACtHR. In the ruling of these cases the IACtHR analysed whether the right to life, enshrined in the American Convention, has been violated by Paraguay. When doing so, the IACtHR declared that due to the basic nature of this right, conditions that restrict the right to life are not admissible. Essentially, this right includes not only the right of every human begin not to be arbitrarily deprived of his life, but also the right that conditions that impede or obstruct access to a decent existence should not be generated.[710] In other words, states have the duty to guarantee conditions that may be necessary to prevent violations of the right to life.[711]

The IACtHR also explained that states must comply with certain obligations under the right to life. The IACtHR stated that:

> *'One of the obligations that the State must inescapably undertake as guarantor, to protect and ensure the right to life, is that of generating minimum living conditions that are compatible with the dignity of the human person and of not creating conditions that hinder or impede it. In this regard, the State has the duty to take positive, concrete measures geared toward fulfilment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority'.*[712]

It is considered that the IACtHR has expanded the scope of the right to life by including the right to a 'dignified life' or 'decent existence', which requires state to generate living conditions that are compatible with the dignity of the human person.[713]

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[708] *Indigenous Community Yakye Axa v Paraguay*, IACtHR, Judgment of 17 June 2005, para 50.95. See also *Indigenous Community Sawhoyamaxa v Paraguay*, IACtHR, Judgment of 29 March 2006, para 73(69).

[709] *Indigenous Community Sawhoyamaxa v Paraguay*, IACtHR, Judgment of 29 March 2006, para 155. See also *Indigenous Community Xákmok Kásek v Paraguay*, IACtHR, Judgment of 24 August 2010, para195.

[710] *Indigenous Community Yakye Axa v Paraguay*, IACtHR, Judgment of 17 June 2005, para 161.

[711] *Indigenous Community Sawhoyamaxa v Paraguay*, IACtHR, Judgment of 29 March 2006, para 151.

[712] *Indigenous Community Yakye Axa v Paraguay*, IACtHR, Judgment of 17 June 2005, para 162.

[713] J. Pasqualucci, 'The Right to a Dignified life (Vida Digna): The Integration of Economic and Social Rights with Civil and Political Rights in the Inter-American Human Rights System' (2008) 31 Hasting International and Comparative Law Review 2.

The IACtHR noted in all three cases that the right to life implies not only the negative obligations that no person shall be deprived of his life, but also, positive obligations to secure the full and free enjoyment of human rights. Therefore, states shall adopt all appropriate measures to protect and preserve the right to life.[714] The IACtHR clarified that a state cannot be responsible for all situations in which the right to life is at risk, because states' positive obligations should not be interpreted as an impossible or disproportionate burden imposed upon the authorities. The IACtHR stated that

> *'In order for this positive obligations to arise, it must be determined that at the moment of the occurrence of the events, the authorities knew or should have known about the existence of a situation posing an immediate and certain risk to the life of an individual or of a group of individuals, and that the necessary measures were not adopted within the scope of their authority which could be reasonably expected to prevent or avoid such risk'.*[715]

In all three cases it was proven that the state knew about the precarious situation in which these indigenous communities were living since the president of Paraguay issued two Presidential Decrees that declared the state of emergency regarding the Yakye Axa, Sawhoyamaxa and Xákmok Kásek communities.[716] The decrees ordered to take the necessary measures to provide medical care and food to the families of the communities during the time required by the judicial proceedings in connection with the lands claimed.

Concerning the settlement of the members of the Yakye Axa community the IACtHR expressed that they do not have access to appropriate housing with the minimum basic services, such as clean water and toilets.[717] Likewise, the IACtHR mentioned that

> *'Special detriment to the right to health, and closely tied to this, detriment to the right to food and access to clean water, have a major impact on the right to a decent existence and basic conditions to exercise other human rights, such as the right to education or the right to cultural identity. In the case of indigenous peoples, access to their ancestral lands and to the use and enjoyment of the natural resources found on them is closely linked to obtaining food and access to clean water'.*[718]

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[714] *Indigenous Community Yakye Axa v Paraguay*, IACtHR, Judgment of 17 June 2005, para 162. *Indigenous Community Sawhoyamaxa v Paraguay*, IACtHR, Judgment of 29 March 2006, para 152; *Indigenous Community Xákmok Kásek v Paraguay*, IACtHR, Judgment of 24 August 2010, para 187.
[715] *Indigenous Community Sawhoyamaxa v Paraguay*, IACtHR, Judgment of 29 March 2006, para 155; *Indigenous Community Xákmok Kásek v Paraguay*, IACtHR, Judgment of 24 August 2010, para188.
[716] *Indigenous Community Yakye Axa v Paraguay*, IACtHR, Judgment of 17 June 2005, para 50.100; and *Indigenous Community Xákmok Kásek v Paraguay*, IACtHR, Judgment of 24 August 2010, para 191.
[717] *Indigenous Community Yakye Axa v Paraguay*, IACtHR, Judgment of 17 June 2005, para 164.
[718] *Indigenous Community Yakye Axa v Paraguay*, IACtHR, Judgment of 17 June 2005, para 167.

The IACtHR also declared that the state failed to guarantee the right to communal property, which has a negative effect on the right to a decent life of the indigenous communities, because they have been deprived of the possibility of access to their traditional means of subsistence, as well as to the use and enjoyment of the natural resources necessary to obtain clean water. Furthermore, the IACtHR declared that the state has not taken the necessary positive measures to ensure that the members of these communities live in conditions that are compatible with their dignity, during the period in which they have been with no territory.[719]

As a result, the IACtHR found a violation of Article 21 of the American Convention that guarantees the right to use and enjoy their property.[720] The IACtHR also found in all cases that the state of Paraguay violated Article 4 (right to life) of the American Convention for failing to take measures -such as the provision of sufficient goods (water and food) and health services- regarding the vulnerable conditions that affected the possibility of the indigenous communities of having a decent life.[721]

In the case *Xákmok Kásek v Paraguay*, the IACtHR examined the possible violation of the right to life in more detail. The IACtHR analysed the alleged violation of the right to life in two parts: a) the international responsibility of the state for the alleged deaths, and b) the right to a decent existence. With the aim of assessing the measures taken by Paraguay to comply with its obligation to guarantee the right to life, the IACtHR subdivided the right to a decent existence in four elements: 1) access to and quality of water; 2) access to food; 3) health; and 4) education. One can consider this classification as the most important elements that constitute a decent existance.

Regarding access to and quality of water the IACtHR observed that the water supplied by Paraguay was not sufficient since the quantity provided amounted to not more than 2.17 litres per person per day, which is less than what according to international standards is required to meet all the basic needs including food and hygiene. In fact, the IACtHR noted that according to international standards, most people need a minimum of 7.5 litres per person per day to meet all basic needs including food and hygiene, and it referred to different documents to support its statement, such as General Comment 15 on the right to water adopted by the CESCR; a research titled 'Basic water requirements for human activities: meeting basic needs' made by Gleick, as well as a study published by the WHO regarding domestic water quantity, written by Howard and Bartram. In its judgment the IACtHR cited the executive summary of the study published by the WHO,

[719] *Indigenous Community Yakye Axa v Paraguay*, IACtHR, Judgment of 17 June 2005, para 168.
[720] *Indigenous Community Yakye Axa v Paraguay*, IACtHR, Judgment of 17 June 2005, para 156; *Indigenous Community Sawhoyamaxa v Paraguay*, IACtHR, Judgment of 29 March 2006, para 144; *Indigenous Community Xákmok Kásek v Paraguay*, IACtHR, Judgment of 24 August 2010, para 182.
[721] *Indigenous Community Yakye Axa vs Paraguay*, IACtHR, Judgment of 17 June 2005, para 176; *Indigenous Community Sawhoyamaxa v Paraguay*, IACtHR, Judgment of 29 March 2006, para 173; *Indigenous Community Xákmok Kásek v Paraguay*, IACtHR, Judgment of 24 August 2010, paras 196, 200 and 208.

which briefly state that *'[b]ased on estimates of requirements of lactating women who engage in moderate physical activity in above-average temperatures, a minimum of 7.5 litres per capita per day will meet the requirement of most people under most conditions. This volume does not account for health and well-being-related demands outside normal domestic use such as water use in health care facilities, food production, economic activity or amenity use'*.[722]

However, the amount of water previously mentioned by the IACtHR is not even close to satisfy daily basic human needs. I consider that the IACtHR misunderstood the mentioned study, by focusing only on the executive summary. The mistake that the IACtHR made regarding the interpretation of the cited paragraph of the executive summary is understandable, since it does not clearly specify that the minimum of 7.5 litres will meet the requirements of most people under most conditions only regarding consumption, leaving out other uses such as personal and household hygiene. When reading the entire study published by the WHO, it is explicitly explained that the volume of 7.5 litres per capita per day *only* amounts for hydration and cooking. The authors of this document clearly explain that only by adding the volume required for food preparation (approximately 2 litres per capita per day) to the volumes of water required for hydration, a figure of total consumption (i.e. drinking water plus water for foodstuffs preparation) of 7.5 litres per capita per day can be calculated as the basic minimum required, taking into account the specific needs of lactating women.[723] In fact, lactating women are the group of people that require the largest amount of water for hydration, even more than children or adults, whether in average conditions or in manual labour in high temperatures. This is the reason why lactating women are taking as a parameter. The volume of 7.5 litres of water is not enough to satisfy hygienic needs. To put it even clearer, the study immediately explains that the need for domestic water supplies for basic health protection exceeds the minimum required for consumption (drinking and cooking). Additional volumes are required for maintaining food and personal hygiene through hand and food washing, bathing and laundry. Further on, the study also mentions that intermediate and optimal access to water, with volumes of 50 to 100 litres and 100 and 300 litres per capita per day (lpcd), generate a low and a very low level of health concern since in the first case most basic hygienic and consumption needs are met, and in the second case all uses can be met.[724]

The IACtHR in its judgment also mentioned a research done by Gleick concerning basic water requirements for human activities, to support its statement regarding the

[722] Guy Howard and Jamie Bartram, 'Domestic Water Quantity, Service Level and Health'(WHO/SDE/WSH/03.02) (World Health Organization, 2003) Executive Summary <http://www.who.int/water_sanitation_health/diseases/wsh0302/en/index.html> accessed 17 October 2012.

[723] Guy Howard and Jamie Bartram, 'Domestic Water Quantity, Service Level and Health'(WHO/SDE/WSH/03.02) (World Health Organization, 2003) 9.

[724] Guy Howard and Jamie Bartram, 'Domestic Water Quantity, Service Level and Health'(WHO/SDE/WSH/03.02) (World Health Organization, 2003) 9 and 22.

minimum amount of water that should be guaranteed. However, this research also differs considerably from the minimum amount of water mentioned by the IACtHR. Gleick recommends 5 lpcd for human survival, 10 lpcd for food preparation, 15 lpcd for bathing and 20 lpcd for hygiene and sanitation, which generate a total amount of 50 litres per person per day to fulfil all basic human needs.[725]

It can be concluded that all international standards to which the IACtHR refers demonstrate that there is a tendency to establish a minimum amount of water to cover the most essential needs for human consumption and hygiene, at a minimum of 50 litres per capita per day.

Furthermore, the IACtHR states in its ruling that *'[a]lso according to international standards, the quality of the water must represent a tolerable level of risk*'.[726] However, the IACtHR does not make any other specific remark regarding water quality. It can be considered that since the Court refers to international standards, it is sending a signal to states to check those available standards regarding drinking water quality to use them at the national level. Up until today the most complete and internationally recognised standards are the guidelines for drinking-water quality published by the WHO, which also uses a reference level of risk.

Continuing with the analysis of the IACtHR's judgment, it is also important to mention the reparation measure concerning the found violations, particularly to the right to a decent life. The IACtHR ordered to Paraguay, as of the date of each judgment, to immediately provide the members of the three indigenous communities with adequate supplies of basic services and goods during the time that they remain landless. The IACtHR requested Paraguay to deliver immediately and on a regular basis: a) sufficient drinking water for human consumption and personal hygiene to the members of the communities; b) the installation of latrines or any other type of adequate sanitation systems in the settlement of the communities; c) physical and psychological attention; and d) deliver sufficient quantity and quality of food, among others.[727]

In the judgment of the Xákmok Kásek community, adopted in 2010, to ensure that the provision of basic supplies and services is adequate and regular, the IACtHR also ordered to Paraguay to prepare a study that establishes at least regarding the provision of potable water, the following factors: 1) the frequency of the deliveries; 2) the method to be used to deliver the water and ensure its purity; and 3) the amount of water to be delivered per person and/or per family.[728]

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[725] Peter H. Gleick, 'Basic Water requirements for Human Activities: Meeting Basic Needs' (1996) 21 Water International 84-85.
[726] *Indigenous Community Xákmok Kásek v Paraguay,* IACtHR, Judgment of 24 August 2010, para 195.
[727] *Indigenous Community Yakye Axa v Paraguay,* IACtHR, Judgment of 17 June 2005, para 221; *Indigenous Community Sawhoyamaxa v Paraguay,* IACtHR, Judgment of 29 March 2006, para 230; *Indigenous Community Xákmok Kásek v Paraguay,* IACtHR, Judgment of 24 August 2010, para 300-301.
[728] *Indigenous Community Xákmok Kásek v Paraguay,* IACtHR, Judgment of 24 August 2010, para 303.

The IACtHR requested this study to guarantee that Paraguay provides sufficient amounts of safe water to satisfy the basic needs of the members of the communities, thus fulfilling the human right to water. Moreover, with this study the IACtHR wanted to prevent more irregularities in the observance of its decisions, since it was proven in the monitoring compliances of the other two judgments, concerning the Yakye Axa and Sawhoyamaxa communities, that the amount of water provided by Paraguay was insufficient an inadequate.[729]

It can be concluded that as mentioned by Pasqualucci the IACtHR is extending the scope of the right to life by incorporating some economic and social rights that are necessary to guarantee a decent existence. In this way, the IACtHR made access to and quality of water, access to food, education and health justiciable within the context of the right to life.[730] In these cases the IACtHR ruled that Paraguay violated the right to life not because it arbitrarily deprived of the life some individuals, but because the state did not provide the members of the indigenous communities with minimum living conditions compatible with a decent existence, knowing that they were living in vulnerable conditions due to their situation of being landless.

4.5.1.3. African human rights system

The main human rights treaty of the African System, the African Charter, does not explicitly include any reference to access to water. Nevertheless, the other two regional treaties, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, and the African Charter on the Rights and Welfare of the Child, clearly request state parties to ensure access to drinking water. Despite the absence of an explicit reference to the right to water in the African Charter, the African Commission has recognised it as a derivative right. The cases in which the African Commission has pointed out the violation of human rights due to lack of access to safe water will be examined. In addition, a Communication brought before the ACERWC will also be analysed.

4.5.1.3.1. Right to dignity (cruel, inhuman or degrading treatment)

The African Commission has considered lack of access to water for personal use to persons deprived of their liberty as inhuman treatment, and therefore a violation of the right to dignity enshrined in article 5 of the African Charter:

[729] IACtHR, Order of the Inter-American Court of Human Rights, *Sawhoyamaxa Indigenous Community v Paraguay*. (Monitoring Compliance with judgment) February 8, 2008, para. 22.
[730] J. Pasqualucci, 'The Right to a Dignified life (Vida Digna): The Integration of Economic and Social Rights with Civil and Political Rights in the Inter-American Human Rights System' (2008) 31 Hasting International and Comparative Law Review 4.

> *'Every individual shall have the right to the respect of the dignity inherent on a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited'.*[731]

In the case *Institute for Human Rights and Development in Africa v Angola*, the complainant alleged that the government of Angola put into affect a campaign with the purpose of expelling foreigners from that country. As a result, some Gambians, who were supposed to have been legally residing and working in Angola were arrested and later deported.[732] The complainant also alleged that the conditions of detention were inhumane as facilities were overcrowded and unsanitary. At one of the detention centres there were only two buckets of water provided for 500 detainees to be used in the bathroom, which was located in the same room where all detained were compelled to eat and sleep. In addition, food was not regularly provided.[733] The African Commission considered that the poor conditions in which the detainees were held, which included lack of access to water for bathroom facilities, '*is a clear violation of article 5 of the African Charter, since such a treatment according to the Commission, cannot be called anything but degrading and inhuman*'.[734] The African Commission held that the terms cruel, inhuman or degrading treatment should be interpreted as wide as possible to protect against abuses, whether physical or mental.[735]

4.5.1.3.2. Right to health

There are two important cases in which the African Commission has acknowledged the violation of the right to health due to lack of access to safe drinking water. The right to health is enshrined in article 16 of the African Charter:

> *'1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.*
>
> *2. State Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick'.*

[731] African Charter on Human and Peoples' Rights, Article 5.
[732] *Institute for Human Rights and Development in Africa v Angola*, African Commission, Communication 292/04, paras 2-3
[733] *Institute for Human Rights and Development in Africa v Angola*, African Commission, Communication 292/04, paras 5, 50, 51.
[734] *Institute for Human Rights and Development in Africa v Angola*, African Commission, Communication 292/04, para 51.
[735] *Institute for Human Rights and Development in Africa v Angola*, African Commission, Communication 292/04, para 52.

The first case, *Free Legal Assistance Group, Lawyer's Committee for Human Rights, Union interafrinaine des Droits de l'Homme, Les Témoins de Jehovah v DRC*[736], refers to complaints regarding a number of violations of human rights by the Republic of Zaire (nowadays the Democratic Republic of the Congo). In this case there were allegations of a large number of violations of human rights, including: torture, executions, detentions, unfair trials, restrictions on freedom of association and freedom of the press. It was also alleged that public finances were illegally mismanaged and that the failure of the government to provide basic services such as safe drinking water and electricity was degrading.[737] With regard to this allegation, the African Commission concluded that Article 16 of the African Charter establishes that state parties should take the necessary measures to protect the health of their people, and that *'[t]he failure of the government to provide basic services necessary for a minimum standard of health, such as safe drinking water and electricity and the shortage of medicine as alleged in communication 100/03 constitutes a violations of Article 16*'.[738]

In a second case, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v The Sudan* [739], the complainants alleged gross, massive and systematic violations of human rights by the Republic of Sudan against the indigenous Black African tribes in the Darfur region. The complainants alleged that violations include large-scale killing, forced displacement of populations, the destruction of public facilities, properties and disruption of life through bombing by military fighter jets in densely populated areas.[740] The complainants also argued that Sudan was complicit in looting and destroying foodstuffs, crops and livestock as well as poisoning wells and denying access to water sources in the Darfur region. The African Commission recalled General Comment 14 of the CESCR and pointed out that *'the right to health extends not only to timely and appropriate health care but also to the underlying determinants of health, such as, access to safe and potable water, an adequate supply of safe food, nutrition, and housing'*.[741] The African Commission also noted that General Comment 14 stablishes that the right to health impose three types of obligations on states: to respect, protect and fulfil. As part of the duty to respect, states should refrain from actions that would prevent the enjoyment of the right, such as unlawfully polluting

[736] *Free legal assistance Group, Lawyer's Committee for Human Rights, Union interafrinaine des Droits de l'Homme, Les Témoinw de Jehovah v DRC* (before Zaire), African Commission, 'Communication 25/89, 47/90, 56/91, 100/93.
[737] *Free legal assistance Group, Lawyer's Committee for Human Rights, Union interafrinaine des Droits de l'Homme, Les Témoinw de Jehovah v DRC* (before Zaire), African Commission, 'Communication 25/89, 47/90, 56/91, 100/93, para 4.
[738] *Free legal assistance Group, Lawyer's Committee for Human Rights, Union interafrinaine des Droits de l'Homme, Les Témoinw de Jehovah v DRC* (before Zaire), African Commission, 'Communication 25/89, 47/90, 56/91, 100/93, para 47.
[739] *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v The Sudan*, African Commission, Communications *279/03 - 296/05* .
[740] *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v The Sudan*, African Commission, Communications *279/03 - 296/05*, paras 2-3.
[741] *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v The Sudan*, African Commission, Communications *279/03 - 296/05*, para 209.

water, even during an armed conflict. Violations thereof can occur through direct actions of states or other entities insufficiently regulated by states. In terms of the duty to protect, states must ensure that third parties (non-state actors) do not infringe upon the enjoyment of the right to health. *'Thus, States should ensure that third parties do not limit people's access to health-related information and services, and the failure to enact or enforce laws to prevent the pollution of water violates the right to health'.*[742] The African Commission recalled its decision in Free Legal Assistance Group and Others v Zaire where the Commission held that the failure of the Government to provide basic services such as safe drinking water and electricity and the shortage of medicine constitutes a violations of Article 16. Finally, the African Commission concluded that *'the destruction of homes, livestock and farms as well as the poisoning of water sources, such as wells expose the victims to serious health risk and amounts to a violation of Article 16 of the Charter'.*[743]

Based on these cases, it is possible to say that the African Commission recognises access to safe drinking water as a right that derives from the right to health incorporated in the African Charter.

Similarly, the African Committee of Experts on the Rights and Welfare of the Child has had the opportunity to analyse a case concerning the possible violation of the right to health embraced in article 14 of the African Charter on the Rights and Welfare of the Child:

> *'1. Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.*
> *2. State Parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures:*
> *(a) to reduce infant and child mortality rate;*
> *(b) to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;*
> *(c) to ensure the provision of adequate nutrition and safe drinking water;*
> *(d) to combat disease and malnutrition within the framework of primary health care through the application of appropriate technology;*
> *(e) to ensure appropriate health care for expectant and nursing mothers;*
> *(f) to develop preventive health care and family life education and provision of service;*
> *(g) to integrate basic health service programmes in national development plans;*

[742] *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v The Sudan*, African Commission, Communications *279/03 - 296/05*, para 209-210.
[743] *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v The Sudan*, African Commission, Communications *279/03 - 296/05*, paras 211-212.

(h) to ensure that all sectors of the society, in particular, parents, children, community leaders and community workers are informed and supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of domestic and other accidents;

(i) to ensure the meaningful participation of non-governmental organizations, local communities and the beneficiary population in the planning and management of a basic service programme for children;

(j) to support through technical and financial means, the mobilization of local community resources in the development of primary health care for children'.[744]

The case, *Children of Nubian Descent v Kenya*,[745] concerns the lack of recognition of citizenship of the Nubians. For a long period they were consistently treated by the government as 'aliens'. The complainants alleged that the refusal by the Kenyan government to recognise the Nubian's claim to land is closely linked with the government's denial of Nubians to Kenyan citizenship. The complainants alleged the violation of the rights to nationality (article 6), prohibition of unlawful/unfair discrimination (article 3), and the consequential violations of the right to education (article 11) and the right to equal access to health care (article 14) of the African Charter on the Rights and Welfare of the Child. In the present case it was alleged that children have suffered denial and unwarranted limitation of their right to health, violating article 14. The ACERWC stated that the African Commission has held that the right to health in the African Charter includes the right to health facilities and access to goods and services to be guaranteed to all without discrimination of any kind.[746] The ACERWC stated that in this case it was alleged that the government had violated, in particular the right enshrined in article 14 (2) (b) (on the duty to ensure the provision of necessary medical assistance and health care to all children with the emphasis on the development of primary health care) and article 14(2) (c) (on the duty to ensure the provision of adequate nutrition and safe drinking water). The ACERWC affirmed that since these provisions are similar in content to the equivalent provision in the African Charter, the findings of the African Commission bear significant relevance.[747] The African Commission has stated that '*It has been confirmed that the underlying conditions for achieving a healthy life are protected by the right to health. Thus lack of electricity,*

[744] African Charter on the Rights and Welfare of the Child, Article 14.

[745] *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubia Descentin Kenya v Kenya*, African Committee of Experts on the Rights and Welfare of the Child, Decision 002/Com/002/2009

[746] *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubia Descentin Kenya v Kenya*, African Committee of Experts on the Rights and Welfare of the Child, Decision 002/Com/002/2009, para 59.

[747] *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubia Descentin Kenya v Kenya*, African Committee of Experts on the Rights and Welfare of the Child, Decision 002/Com/002/2009, para 60.

drinking water and medicines amount to a violation of the right to health'.[748] The ACERWC declared that the failure of the government to provide the mentioned basic services, which includes access to drinking water, amounts to an infringement of the right to health.

4.5.1.3.3. Right to a healthy environment

The African Commission also examined a case of environmental contamination, including water pollution, which may affect access to clean drinking water. The right to a healthy environment is enshrined in article 24 of the African Charter:

> *'All peoples shall have the right to a general satisfactory environment favourable to their development'.*

The case, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*[749], refers to a complaint presented against Nigeria, where it was alleged that the government of Nigeria has been directly involved in oil production through the state oil company, the Nigerian National Petroleum Company (NNP). The operations of this company have caused environmental degradation (water, soil and air contamination) and health problems among the Ogoni People as a result of the contamination of the environment.[750] It was alleged that the Nigerian government has participated in irresponsible oil development that has poisoned much of the soil and water upon which Ogoni farming and fishing depended,[751] therefore violating the right to health (article 16) and clean environment (article 24) recognised in the African Charter. The African Commission noted that these two rights recognise the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual. The African Commission also held that the state is under the obligation to respect the right to health and the right to a satisfactory environment, which entails mainly non-interventionist conduct from the state. For example not carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual.[752]

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[748] *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubia Descentin Kenya v Kenya,* African Committee of Experts on the Rights and Welfare of the Child, Decision 002/Com/002/2009, para 59.

[749] *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria,* African Commission, Communication 155/96.

[750] *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria,* African Commission, Communication 155/96, paras 1-2.

[751] *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria,* African Commission, Communication 155/96, para 9.

[752] *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria,* African Commission, Communication 155/96, paras 51-52.

The African Commission noted that *'[t]he right to a general satisfactory environment, as guaranteed under article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the state to take reasonable and other measure to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources*'.[753] In this case it was decided that Nigeria violated the right to health and the right to a satisfactory environment due to the vast contamination caused, inter alia by allowing that the national oil company disposed toxic waste in waterways, which affected the health of the community living nearby. In this case the right to water is protected through both the right to a satisfactory environment and the right to health, since the Ogoni People were affected by a large pollution that denied them access to safe drinking water.

4.5.1.3.4. Right to development

The African Commission analysed a case where lack of access to natural resources, constituted a violation of the right to development enshrined in article 22 of the African Charter:

> *'1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.*
>
> *2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development'.*

In this case, *Centre for Minority Rights Development and Minority Rights Group v Kenya*[754], an indigenous community (Endorois) was displaced in Kenya from their ancestral land (the area of Lake Bogoria) to a semi-arid land that was not adequate to continue with their traditional way of life, without proper prior consultation or adequate effective compensation. The displacement was made because the mentioned area was declared a game reserve. Additionally, the Endorois were denied the possibility to re-enter their ancestral land, therefore, not being able to practice their religion neither their normal subsistence activities. When analysing the complaint, the African Commission examined, inter alia, whether the right to development (article 22) of the African Charter was violated. The African Commission noted that the right to development is a two-pronged test, that a violation of either, the procedural or substantive element, constitutes a violation of this right. Fulfilling only one of the two prongs will not satisfy

[753] *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*, African Commission, Communication 155/96, para 52.
[754] *Centre for Minority Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*. African Commission, Communication 276/03

the right to development.[755] The African Commission stated that the right to development is also about providing people with the ability to choose where to live; freedom of choice must be present as a part of the right to development.[756] In this case, the Endorois believed that they had no choice but to leave their ancestral land and when some of them tried to reoccupy their former land and houses, they were received with violence and forced relocations.[757] The African Commission noted that the right to development includes active, free and meaningful participation in development. The result of development should have therefore empowered the Endorois community. It is not sufficient for the Kenyan authorities to merely give food aid to the Endorois. The capabilities and choices of the Endorios must improve in order for the right to development to be realised.[758]

In this decision the African Commission cited the Yakye Axa judgment of the IACtHR and used it as an example. The African Commission noted that the IACtHR '*found that the members of the Yakye Axa community live in extremely destitute conditions as a consequence of lack of land and access to natural resources, […] as well as the precariousness of the temporary settlement where they have had to remain, waiting for a solution to their land claim*'.[759] The African Commission noted that the settlement where the members of the Yakye Axa Community were living did not have access to appropriate housing with the basic minimum service, such as clean water and toilets. The African Commission stated that *'[t]he precariousness of the Endorois' post-dispossession settlement has had similar effects (….). The Endorois were relegated to semi-arid land, which proved unsustainable for pastoralism, especially in view of the strict prohibition on access to the Lake area's medicinal salt licks or traditional water sources*'.[760] The African Commission also received evidence that access to clean drinking water was severely undermined for the Endorois community as a result of losing their ancestral land (Lake Bogoria), which has ample fresh water sources. Similarly, their traditional means of subsistence (through grazing their animals) has been curtailed due to lack of access to the green pastures of their ancestral land.[761] The African Commission affirmed that *'[t]he right to development will be violated when the*

[755] *Centre for Minority Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*. African Commission, Communication 276/03, para 277
[756] *Centre for Minority Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*. African Commission, Communication 276/03, para 278
[757] *Centre for Minority Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*. African Commission, Communication 276/03, paras 278 – 279.
[758] *Centre for Minority Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*. African Commission, Communication 276/03, para 283.
[759] *Centre for Minority Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*. African Commission, Communication 276/03, para 284.
[760] *Centre for Minority Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*. African Commission, Communication 276/03, para 286.
[761] *Centre for Minority Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*. African Commission, Communication 276/03, para 288.

development in question decreases the well-being of the community'. [762] These circumstances proved that the capabilities and choices of the Endorois did not improve. In this case, the African Commission was convinced of the inadequacy of the consultation process, due to a number of irregularities, and of the substantive losses that the Endorois has faced, such as the actual loss of well-being and the denial of benefits accruing from the game reserve. The African Commission is of the view that Kenya bears the burden for creating conditions favourable to a people's development, and it concluded that there was a violation of article 22 of the African Charter.[763] In this case the African Commission took into consideration the precarious condition in which the Endorois community was living after they were displaced, including lack of access to water, since these conditions indicate a decrease in their well-being and therefore, a violation of the right to development.

4.6. Independent right to water in regional customary law?

At the regional level we focused on studying the human right to water in the European, the Inter-American and the African human rights system. None of the regional human rights conventions adopted under these systems have recognised the right to water as a stand-alone right. On the other hand, the recently adopted ASEAN Human Rights Declaration has unambiguously enshrined the independent '*right to safe drinking water and sanitation*'.[764] It seems that the drafters of article 28 of the Declaration were inspired by General Comment 15 of the CESCR, but they go one step further, since article 28 establishes that the right to an adequate standard of living includes a number of rights for its realisation, among which the right to water is explicitly incorporated. Under the Inter-American system two human rights conventions adopted in June 2013, not yet into force, require states to eliminate and prohibit limitations based on racism or discrimination on '*the right of every person, to access and sustainably use water*'.

It is worth mentioning that two regional human rights systems, the African and the Arab, although they do not acknowledge the right to water as a stand-alone right, they explicitly refer to access to water among their conventions. The African System has incorporated in the Protocol to the African Chapter on Human and Peoples' Rights on the Rights of Women in Africa access to clean drinking water as part of the right to food. And the African Charter on the Rights and Welfare of the Child incorporates access to safe drinking water as part of the right to health. Similarly, the Arab Charter on Human Rights explicitly refers to safe drinking water as an essential component of the right to health. Thus, the right to water is recognised as a derivative right. On the

[762] *Centre for Minority Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*. African Commission, Communication 276/03, para 294.
[763] *Centre for Minority Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*. African Commission, Communication 276/03, paras 297-298.
[764] ASEAN Human Rights Declaration, Article 28.

other hand regarding the European system, there is no reference whatsoever to access to water in their conventions.

The judgments and decisions of the different regional bodies in charge of reviewing complaints regarding alleged violations of human rights by state parties, found that lack of access to water lead to the violation of other human rights in the European, the Inter-American and the African systems. All decisions consider access to water an essential element of other human rights.[765] None of the regional bodies has recognised the right to water as a stand-alone right. According to the examined decisions the ECtHR, the IACtHR, the IAComHR, and the African Commission are of the same opinion that lack or deprivation of access to drinking water for persons deprived of their liberty or under the custody of the states, constitute a cruel, inhuman or degrading treatment, and is therefore a violation of a human right.[766] Under the European system the lack of access to water is also considered to violate other human rights, such as the right to a healthy environment, which according to the jurisprudence of the ECtHR is implicit in the right to respect for private and family life embraced in the European Convention,[767] and the

[765] *Ireland v The United Kingdom* (App no 5310/71) ECtHR 18 January 1978; *Iacov Stanciu v Romania* (App no 35972/05) ECtHR 24 July 2012; *Onaca v Romania* (App no 22661/06) ECtHR 13 March 2012; *Dubetska and others v Ukraine* (App no 30499/03) ECtHR 10 February 2011; *Zander v Sweden* (app no 14282/88) ECtHR 25 November 1993; *Centre on Housing Rights and Evictions (COHRE) v Italy* (Complain No. 58/2009) European Committee of Social Rights, Decision of the Merits 25 June 2010; *European Federation of National Organisations working with the Homeless (FEANTSA) v France* (Complaint No. 39/2006) European Committee of Social Rights, Decision on the Merits 5 December 2007; *López Álvarez v Honduras*, IACtHR, Judgment of 1 February 2006; *Vélez Loor v Panamá*, IACtHR, judgment of 23 November 2010; *Whitley Myrie v Jamaica*, IAComHR, Report 41/04 (case 12.417) 12 October 2004; *Oscar Elias Biscet et al v Cuba*, IAComHR, Report 67/06 (case 12.476) 21 October 2006; *Indigenous Community Yakye Axa v Paraguay*, IACtHR, Judgment of 17 June 2005; *Indigenous Community Sawhoyamaxa v Paraguay*, IACtHR, Judgment of 29 March 2006; *Indigenous Community Xákmok Kásek v Paraguay*, IACtHR, Judgment of 24 August 2010; *Institute for Human Rights and Development in Africa v Angola*, African Commission, Communication 292/04; *Free legal assistance Group, Lawyer's Committee for Human Rights, Union interafrinaine des Droits de l'Homme, Les Témoinw de Jehovah v DRC* (before Zaire), African Commission, 'Communication 25/89, 47/90, 56/91, 100/93; *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v The Sudan*, African Commission, Communications *279/03 - 296/05; Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubia Descentin Kenya v Kenya*, African Committee of Experts on the Rights and Welfare of the Child, Decision 002/Com/002/2009; *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*, African Commission, Communication 155/96; *Centre for Minority Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*. African Commission, Communication 276/03.

[766] *Ireland v The United Kingdom* (App no 5310/71) ECtHR 18 January 1978; *Iacov Stanciu v Romania* (App no 35972/05) ECtHR 24 July 2012; *Onaca v Romania* (App no 22661/06) ECtHR 13 March 2012; *M.S.S v Belgium and Greece* (app no 30696/09) ECtHR 21 January 2011; *López Álvarez v Honduras*, IACtHR, Judgment of 1 February 2006; *Vélez Loor v Panamá*, IACtHR, judgment of 23 November 2010; *Whitley Myrie v Jamaica*, IAComHR, Report 41/04 (case 12.417) 12 October 2004; *Oscar Elias Biscet et al v Cuba*, IAComHR, Report 67/06 (case 12.476) 21 October 2006; *Institute for Human Rights and Development in Africa v Angola*, African Commission, Communication 292/04.

[767] *Dubetska and others v Ukraine* (App no 30499/03) ECtHR 10 February 2011; *Taskin and Others v Tuerkey* (app no 46117/99) ECtHR 10 November 2004; *Taskin and Others v Tuerkey* (app no 46117/99) ECtHR 10 November 2004; *Tătar v Romania* (app no 67021/01) ECtHR 27 January 2009.

right to housing recognised in the Revised European Social Charter.[768] In one particular case the ECtHR declared that when a landowner has the ability to use water wells located within his or her land for drinking purposes, access to this resource is understood as being part of the right to property.[769] Likewise, the African Commission has acknowledged that lack of access to clean drinking water violates the right to development and the right to health.[770] The European and the African system agree that the right to water is implicit in the right to a healthy environment when water pollution results in non-access to safe drinking water. The IACtHR acknowledges that access to safe drinking water is one of the main elements of the right to decent existence, which is included within the right to life.[771]

The organisations that created the three most well-established regional human rights systems have also expressed their position concerning the right to water. In resolutions adopted by the Committee of Ministers of the Council of Europe and the Parliamentary Assembly, the right to water is acknowledged as a fundamental right that derives from other rights, particularly the right to an adequate standard of living. Similarly, the Organisation of American States reaffirmed in General Assembly Resolution 2760 that states should continue their efforts to ensure individuals access to safe drinking water as an integral component of the realisation of all human rights. Likewise, the African Union recognised the importance of water and sanitation for social, economic and environmental development of the African continent.

Based on the decisions and judgments adopted by the different bodies in charge of the compliance of the regional human rights conventions, it can be concluded that the right to water at the regional level is an essential component of other human rights, in other words a derivative right. Courts have become very creative when it comes to protect new human rights, to the point that they are broadening the scope of application of some human rights. But there is no particular sign at this point that indicates that a regional

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[768] *European Federation of National Organisations working with the Homeless (FEANTSA) v France* (Complaint No. 39/2006) European Committee of Social Rights, Decision on the Merits 5 December 2007; *Centre on Housing Rights and Evictions (COHRE) v Italy* (Complain No. 58/2009) European Committee of Social Rights, Decision of the Merits 25 June 2010; *Centre on Housing Rights and Evictions (COHRE) v Italy* (Complain No. 27/2004) European Committee of Social Rights, Decision on the merits 7 December 2005; *European Roma and Travellers Forum v. France* (Complain No. 64/2011) European Committee of Social Rights, Decision on the merits 24 January 2012; *European Roma Rights Centre (EERC) v Portugal* (Complaint No. 61/2010) European Committee of Social Rights, Decision on the Merits 30 June 2011.

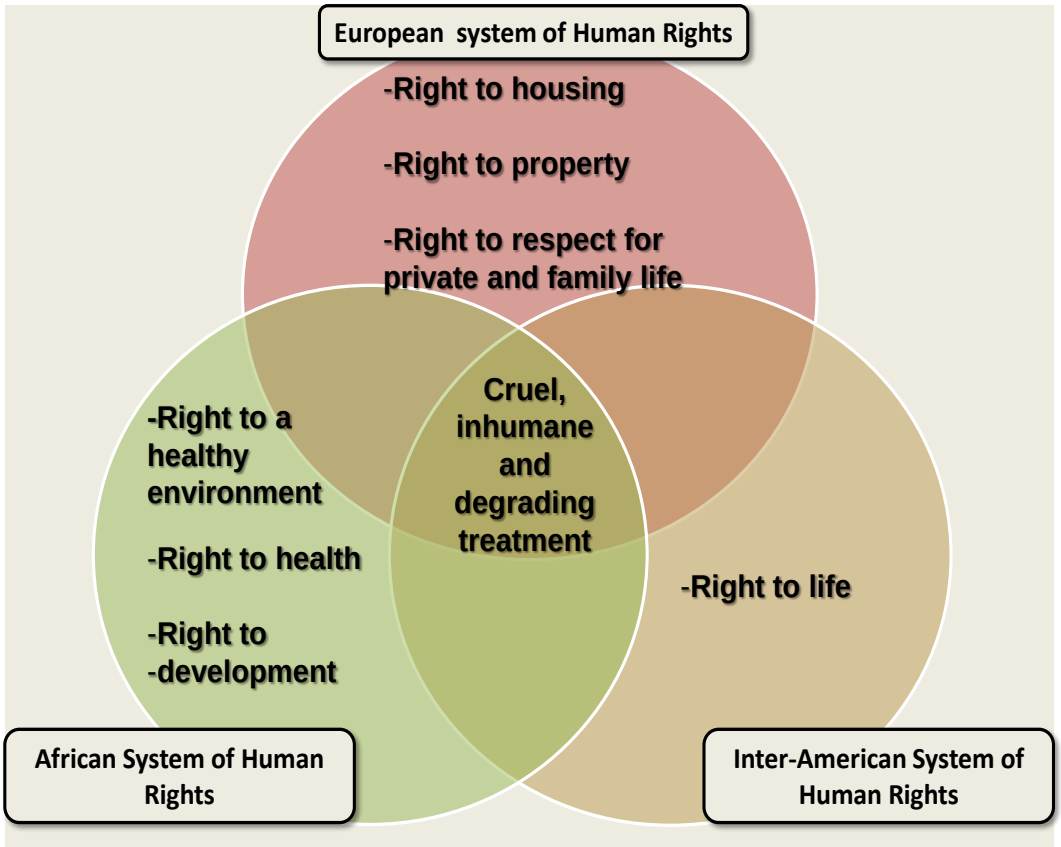
[769] *Zander v Sweden* (app no 14282/88) ECtHR 25 November 1993.

[770] *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*, African Commission, Communication 155/96; *Centre for Minority Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*. African Commission, Communication 276/03; *Free legal assistance Group, Lawyer's Committee for Human Rights, Union interafrinaine des Droits de l'Homme, Les Témoinw de Jehovah v DRC* (before Zaire), African Commission, 'Communication 25/89, 47/90, 56/91, 100/93.

[771] *Indigenous Community Yakye Axa v Paraguay*, IACtHR, Judgment of 17 June 2005; *Indigenous Community Sawhoyamaxa v Paraguay*, IACtHR, Judgment of 29 March 2006; *Indigenous Community Xákmok Kásek v Paraguay*, IACtHR, Judgment of 24 August 2010.

court might take the lead to individualise the right to water within another existing human right, just like the ECtHR did with the right to a healthy environment. On the other hand, the recent adoption under the auspices of the OAS of two new conventions concerning discrimination and racism provides a first signal that the recognition of the right to water as a stand-alone right may be achieved through the adoption of new conventions or the amendment of existing ones.

The following graph illustrates the connection that exists between the European, Inter-American and the African human rights system concerning their recognition of access to clean drinking water as an essential component of other human rights. The circle above represents the European system, the one on the left symbolises the African system and the circle on the right represents the Inter-American system. In the connection points between the different circles we find the human rights of which all three or two systems consider water as an important component.



4.7. Conclusions

In the five regional human rights systems: the European, the Inter-American, the African, the ASEAN and the League of Arab States the human right to water is acknowledged in one way or another. For instance, by explicitly incorporating 'drinking water' as an essential element of a right recognised in regional human rights conventions or expressly acknowledging the right to water as a stand-alone right; recognising the right through soft law documents, such as resolutions, or by declaring in judgments or decisions that access to sufficient and safe drinking water is essential to avoid the violation of certain human rights.

The first section of this chapter examined the materialisation of the human right to water in the existing regional human rights conventions. It can be concluded that the right to water is explicitly enshrined in the ASEAN Human Rights Declarations, which unambiguously stipulate *'the right to safe drinking water and sanitation*' as one of the rights that are indispensable for the realisation of the right to an adequate standard of living. The two new Inter-American conventions against racism and discrimination stipulate that states undertake to prevent, eliminate, prohibit and punish all acts of discrimination including limitations on *'the right of every person to access and sustainably use water'*. Other regional conventions incorporate access to water as a right that derives from other rights. In the Arab Charter and the African Charter on the Right of the Child access to drinking water is an essential component of the right to health, while in the African Protocol on the Rights to Women it is a relevant element of the right to food. In contrast, there is not any reference concerning access to drinking water in any of the treaties adopted under the European human rights systems. At the European level, the Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourse and International Lakes expressly stipulates that it is aiming at providing access to drinking water for everyone. Although this Protocol is not considered to be part of the international human rights system, it is clear that one of its purposes is to contribute to the realisation of the human right to water.

With regard to the recognition of the right to water in soft law documents, it can be said that the Council of Europe and the OAS have made their contribution. Under the Council of Europe the Committee of Ministers adopted in 2001 a Recommendation on the European Water Charter which states that everyone has the right to a sufficient quantity of water for his or her basic needs. The European Water Charter of the Council of Europe for instance, recognises that water is a human right that is incorporated in two fundamental rights recognised in international human rights treaties: the right to be free from hunger and the right to an adequate standard of living. Additionally, the Parliamentary Assembly stated that recognising access to water as a fundamental right could serve as an important tool to encourage governments to improve their efforts to

meet basic needs[772], and that access to water must be recognised as a fundamental human right because it is essential to life and is a resource that must be shared by humankind.[773] Similarly, the General Assembly of the OAS adopted in 2012 a resolution to affirm the importance for each state to continue its efforts to ensure that individuals subject to its jurisdiction have access to safe drinking water and sanitation as integral components of the realisation of all human rights.[774] The Assembly of the African Union also recognised the importance of water and sanitation for social, economic and environmental development of the African Continent, and reaffirmed their commitment to the Millennium Development Goal on water supply and sanitation.[775] Additionally the Pretoria Declaration on Economic, Social and Cultural Rights in Africa adopted in 2004, also recognised that access to adequate supply of safe and potable water is an essential element of the right to health embraced in the African Convention. Thus, at the regional level there is a tendency to acknowledge the right to water as a derivative right, since this right is an integral component of other human rights.

The second section of this chapter scrutinised contentious procedures established by the regional systems with a view to find out whether the human right to water is recognised and in what ways by regional human rights bodies. None of the decisions or judgments adopted under the European, the Inter-American or the African system acknowledges the right to water as a stand-alone right. Nevertheless, access to water is considered to be an essential element of certain human rights, regardless of whether this element is explicitly incorporated or not in the regional conventions. The European, the Inter-American and the African system are of the same opinion that lack of access to drinking water for people deprived of their liberty and under the custody of the state constitutes a cruel, inhuman and degrading treatment. The European and the African systems consider that when water pollution denies access to safe drinking water, this situation violates the right to a healthy environment. Although the European Convention on Human Rights does not explicitly include this right, the ECtHR has indisputably recognised the right to water as a right that is implicit in the right to respect for private and family life (article 8 of the European Convention). So far, the ECtHR has only examined the aspect of water quality, since the right to a healthy environment has been used to consider whether contamination (including water pollution) can affect the right to private and family life. Nevertheless, not only the quality but also the quantity and the ability to afford drinking water may affect family life. According to the definition of 'adequate housing' adopted by the European Committee of Social Rights we can conclude that the right to water is implicit in the right to an adequate housing.

[772] Parliamentary Assembly Recommendation 1731(2006).
[773] Parliamentary Assembly Resolution 1693(2009) (adopted on 2 October 2009).
[774] Organization of American States (General Assembly) 'Resolution The Human Right to Safe Drinking Water and Sanitation'(adopted at the 4th plenary session, 5 June 2012) AG/RES.2760 (XLII-0/12).
[775] Organisation for African Union (General Assembly) 'Declaration Sharm El-Sheikh Commitments for Accelerating the Achievement of Water and Sanitation Goals in Africa' (2008) Assembly/AU/Decl.1 (XI)

The IACtHR asserted in three cases concerning indigenous peoples, who were living under special vulnerable conditions, that the right to life not only implies the negative obligation that no person shall be deprived of his life, but also the positive obligation to secure the full and free enjoyment of the right, therefore, taking all appropriate measures to protect and preserve the right to life. The IACtHR has extended the scope of application of the right to life by incorporating the right to 'dignified life' or 'decent existence', which require the state to generate conditions compatible with human dignity. The IACtHR established the four main elements that are essential to guarantee the right to decent existence: 1) access to and quality of water; 2) access to food; 3) education; and 4) health. In this way the Court includes economic and social rights within the right to life and made them justiciable.

In the African system, both the African Commission and the ACERWC consider that the right to water is incorporated in the right to health. The latter understands that safe drinking water is an underlying determinant of health, and a basic service necessary for a minimum standard of health. Likewise, the African Commission asserts that the poisoning of water resources is a violation of the right to health. Additionally, in a case where indigenous peoples where displaced from their land, undermining their access to drinking water as well as other means of subsistence, the African Commission declared that when development activities are decreasing the well-being of a community, the right to development is violated.

The previously examined cases show us how creative these courts have become in order to protect the rights of individuals under their jurisdiction. In some cases the interpretations of the court are as broad as possible in order to include elements that are not explicitly mentioned in the respective conventions.

Overall, we can conclude that at this time at the regional level, the right to water is generally acknowledged as a derivative right, which can emanate from the right to life, prohibition of torture or right to dignity, the right to health, the right to housing, the right to development and the right to a healthy environment. Nevertheless, this situation is slightly changing with the explicit recognition of the right to water in new conventions. It is also known that regional courts pay close attention to each other concerning decisions taken in similar case. Thus, it is also possible that due to the relevance of drinking water, regional human rights courts start imitating the modus operandi used by the ECtHR regarding the individualisation and recognition of the right to a healthy environment and adopt a similar position regarding the human right to water with the purpose of providing to this right a more clear recognition within their systems.

CHAPTER V

5. ACKNOWLEDGEMENT OF THE HUMAN RIGHT TO WATER AT THE DOMESTIC LEVEL: A CASE STUDY APPROACH

5.1. Introduction

Under the international law of human rights, each state has a primary obligation towards its citizens and other individuals living within its territory. These obligations were devised to protect individuals from the exercise of power of the territorial state.[776] Therefore, human rights are normally framed within a territorial perspective, creating a vertical relationship (states to individuals). As a result, human rights identify certain obligations and responsibilities of states (duty bearers) towards the mentioned individuals or groups of people (rights holders). Due to the existence of this vertical relationship, human rights are generally implemented domestically. For this reason, this chapter examines at the national level, whether some states in South America have recognised the human right to water, and if so, whether this right is acknowledged as a derivative or independent right, and how it is implemented.

A number of countries in South America have already adopted the human right to water as an independent right in their constitution, their legislation or by the jurisprudence of their courts. One of the first South American countries, if not the first, that recognised the human right to water was Colombia. The Colombian Constitutional Court, characterised as being a progressive court, acknowledged as early as 1992 the right to water in its jurisprudence. This Court declared that the supply of drinking water is a fundamental right. [777] In recent years, the Peruvian Constitutional Tribunal acknowledged the human right to water through its jurisprudence.[778] This right is also explicitly incorporated into the constitution of other South American states. In most cases, the constitutional recognition was triggered by the negative effects of the privatisation of drinking water services experienced in those countries. For instance, on 31 October 2004 Uruguayan citizens voted in favour of a constitutional reform that recognised drinking water and sanitation as a fundamental right, in response to a previous privatisation process. The Uruguayan Constitution now stipulates that drinking water services shall exclusively and directly be provided by public entities. [779]

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[776] Fons Coomans and Menno T. Kamminga, 'Comparative Introductory Comments on the Extraterritorial Application of Human Rights Treaties', in Fons Coomans and Menno T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp 2004) 1.

[777] Colombian Constitutional Court, Tutela, T-578 de 1992, Magistrado Ponenete (M.P.) Alejandro Martinez Caballero, para 6 a.

[778] Peruvian Constitutional Tribunal, Exp No 6546-2006-PA/TC, *Cesar Augusto Zuñiga Lopez v. Lambayeque*, Lima, 7 November 2007. See also Peruvian Constitutional Tribunal, Exp No 01985-2011-PA-TC, *Eduardo Antonio Malca Vasquez v. Cajamarca*, Lima, 22 Septembre 2011.

[779] Constitución de Uruguay, Artículo 47. "El agua es un recurso natural esencial para la vida. El acceso al agua potable y el acceso al saneamiento, constituyen derechos humanos fundamentales"… 3) El

Subsequently, Ecuador in 2008[780] and Bolivia in 2009 also reformed their constitutions and unambiguously incorporated the human right to water. Other countries recognise the human right to water through their national legislation. This is the case for Venezuela[781], Paraguay[782] and Peru[783].

Four South American states have been selected to examine in detail the domestic implementation of the human right to water. It should be noted that political regimes and the legal order established in each country may influence its recognition and most importantly its effective implementation. Thus, countries that could offer different ways of recognising the human right to water were chosen. Bolivia is part of the study, since it enshrines the human right to water in its constitution. Colombia and Argentina were selected because the jurisprudence of both countries has dealt with the issue of the human right to water, although such a right is not included in their respective constitutions. Finally, Chile is included in this study since it is the only country in the region that considers water as merchandise and strongly encourages the privatisation of drinking water services.

The first section of this chapter examines how the four countries under study recognise the human right to water, through which legal instruments and whether the right is acknowledged as a derivate or as an independent right. Next it will explore whether the national legal systems of the selected countries offer effective judicial mechanisms for the protection of the right to water. In the second section, the legislation and case-law of the four countries will be examined to observe the level of protection granted to citizens with regard to their right to water. The case-law will deal with issues of access to water, quality of the resource, economic access and disconnection of drinking water supply. Subsequently some conclusions will be drawn.

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servicio público de saneamiento y el servicio público de abastecimiento de agua para el consumo humano serán prestado exclusiva y directamente por personas jurídicas estatales.

[780] Constitución del Ecuador, 2008. Articulo 2. "Son deberes primordiales del Estado: 1. Garantizar sin discriminación alguna el efectivo goce de los derechos establecidos en la Constitución y en los instrumentos internacionales, en particular la educación, la salud, la alimentación, la seguridad social y el agua para sus habitantes". Articulo 12. "El derecho humano al agua es fundamental e irrenunciable. El agua constituye patrimonio nacional estratégico de uso público, inalienable, imprescriptible, inembargable y esencial para la vida".

[781] Ley de Aguas (adopted on 9 November 2006) Articulo 5. "Los principios que rigen la gestión integral de las aguas se enmarcan en el reconocimiento y ratificación de la soberanía plena que ejerce la Republica sobre las aguas y son: 1. El acceso al agua es un derecho humano fundamental". Gaceta Oficial de la Republica Bolivariana de Venezuela No 38.595, 2 January 2007.

[782] Ley 3239 de 2007 (adopted on 10 July 2007), Articulo 3 "La gestión integral y sustentable de los recursos hídricos del Paraguay se regirá por los siguientes principios:
b) El acceso al agua para la satisfacción de las necesidades básicas es un derecho humano y debe ser garantizado por el estado, en cantidad y calidad adecuada"

[783] Ley 29338(adopted on 30 March 2009, published 31 March 2009), Articulo III "Los principios que rigen el uso y gestión integrada de los recursos hídricos son:
2. Principio de Prioridad en el acceso al agua. El acceso al agua para la satisfacción de las necesidades primarias de la persona humana es prioritario por ser un derecho fundamental sobre cualquier uso, inclusive en épocas de escasez"

5.2. Recognition and materialisation of the human right to water in national legal systems

Herein the main structure of the national legal system of the four countries under study and, particularly regarding the provision of drinking water, is analysed. Next, the mechanisms for recognising and protecting the human right to water are scrutinised.

5.2.1. Argentina

Argentina is a federal state composed of 23 provinces and the Autonomous city of Buenos Aires. As a result, there is a division of power between the federal government and the provinces. Since the provinces already existed before the federal state was created, the former have all the powers that are not delegated to the central government. According to article 121 of the Federal Constitution of Argentina on the distribution of competences, the provinces have reserved to themselves all the powers that were not delegated to the Federal Government (residual competences), as well as those powers explicitly reserved to themselves by special agreements at the time of their incorporation. Based on the distribution of competences, the Federal Constitution establishes that each province enacts its own constitution, ensuring its municipal autonomy and the scope and content of its institutional, political, administrative, economic and financial affairs.[784] Additionally, the Federal Constitution establishes that the provinces have the original dominion over the natural resources in their territory.[785] As a result, surface water and groundwater in the territory of each province are under the control of the provinces.

Until the 1980's water and sanitation services in Argentina remained nationalised. Afterwards, the federal government decided to decentralise these services. Hence, the provinces became responsible for the supply of drinking water and sanitation. These services were provided by provincial companies and in some cases by municipalities and local users' cooperatives.[786] In August 1989, the National Congress of Argentina enacted Law 23.696 known as the State Reform Law.[787] This Law authorised the privatisation of the provision of public services. In 1990 the privatisation of water services started, and a number of concession contracts were signed in different provinces with different private companies. However, due to a number of difficulties with the privatisation process, such as breach of contract concerning investment to extend the water service, as well as problems related with the quality of the service and

[784] Argentine Constitution, Article 123.
[785] Argentine Constitution, Article 124.
[786] Ernest & Yong, Cohen&co Advisers, '*Infrastructure in Latin America: Recent Evolution and Key Challenges (Seven Country Briefs) – C.B 1/7:Argenitna'* (Published by the World Bank, July 2005) 58 <http://www.worldbank.org/transport/transportresults/regions/lac/cb-argentina-260705.pdf> accessed 30 October 2012.
[787] Law 23.696, de Reforma del Estado (entered into force on 17 August 1989, published in Official Journal on 23 August 1989).

public health, some of the concession contracts were rescinded.[788] Therefore, due to the decentralisation of water services, there is no federal Argentine legislation dealing with drinking water supply. In fact, due to the autonomy of the provinces and the decentralisation of the services, some provinces have created regulatory bodies to control and monitor operators that provide the supply of drinking water and sanitation. Each of these regulatory bodies is able to formulate various concession contracts, specifying different types of services, tariff rules, and areas of coverage for the provision of the services. Therefore, there are no uniform tariff regimes or procedures for disconnection. Regulation concerning drinking water services is a heterogeneous one.[789]

Water and sanitation services in Argentina are now supplied by a number of providers: concessionaires, municipalities and even cooperatives organised by users or consumers. In addition, there is no national entity controlling these services. Instead, there are different provincial regulatory bodies, which are public entities in charge of controlling and monitoring the supply of drinking water.[790] Currently, sixteen provinces out of the twenty-tree have created a regulatory body to control operators (concessionaires, municipalities, cooperatives) that supply drinking water and sanitation.[791]

5.2.1.1. Recognition of the right to water

The Federal Constitution of Argentina was last amended in 1994, recognising new human rights and guarantees. Article 75 of the Constitution grants constitutional hierarchy to a number of explicitly mentioned international human rights conventions and is open for other human rights conventions to acquire this important status. As a result, the catalogue of fundamental human rights in the Argentine legal system was enlarged, mainly because the listed conventions in article 75 are complementary to the rights and guarantees recognised prior to the constitutional reform. As a result, the rights explicitly mentioned in the constitution were broadened, and the framework of protection extended.[792]

Article 75, numeral 22, empowers Congress:

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[788] See Decreto 303 de 2006 (adopted on 21 March 2006) Rescíndase el contrato de Concesión suscripto entre el Estado Nacional y la empresa Aguas Argentinas S.A., por culpa del Concesionario. Reasúmase transitoriamente la operación y la prestación del servicio, Preamble.

[789] Ernest & Yong, Cohen&co Advisers, '*Infrastructure in Latin America: Recent Evolution and Key Challenges (Seven Country Briefs) – C.B 1/7:Argenitna'* (Published by the World Bank, July 2005) 69 <http://www.worldbank.org/transport/transportresults/regions/lac/cb-argentina-260705.pdf> accessed 30 October 2012.

[790] Miguel Mathus Escorihuela, 'El Derecho al Agua en el Derecho Argentino' in Antonio Embid Irujo (ed), *El Derecho al Agua* (Editorial Aranzadi, Madrid 2006) 229.

[791] See the website of the AFERAS, Asociación Federal de Entes Reguladores de Agua y Saneamiento <http://www.aferas.org.ar/sitio/miembros.php> accessed 3 November 2012.

[792] Miguel Mathus Escorihuela, 'El Derecho al Agua en el Derecho Argentino' in Antonio Embid Irujo (ed), *El Derecho al Agua* (Editorial Aranzadi, Madrid 2006) 235.

To approve or reject treaties concluded with other nations and international organizations, and concordats with the Holy See. Treaties and concordats have a higher hierarchy than laws.
The American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights and its empowering Protocol; the Convention on the Prevention and Punishment of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against Woman; the Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments; the Convention on the Rights of the Child; in the full force of their provisions, they have constitutional hierarchy, do no repeal any section of the First Part of this Constitution and are to be understood as complementing the rights and guarantees recognised herein. They shall only be denounced, in such event, by the National Executive Power after the approval of two-thirds of all the members of each House.

In order to attain constitutional hierarchy, other treaties and conventions on human rights shall require the vote of two-thirds of all the members of each House, after their approval by Congress.[793]

The expression 'in the full force of their provisions' is interpreted not only as those treaties were adopted and ratified by Argentina, with or without reservations, but also as those international conventions are interpreted by international jurisprudence, including the authoritative interpretations of the conventions.[794]

From this provision it can be inferred that the right to water is incorporated in the Argentine legal system and has constitutional hierarchy, since this right is recognised in some of the international conventions listed under article 75 of the Constitution, such as the Convention on the Elimination of All forms of Discrimination against Women (article 14) and the Convention on the Rights of the Child (article 24).[795] The right to water is also recognised in the authoritative interpretation of the ICESCR made by the CESCR in General Comment 15. The CESCR asserts that the human right to water is

[793] Argentine Constitution, Article 75, (translated by Georgetown University, Political Database of the Americas) <http://pdba.georgetown.edu/Constitutions/Argentina/argen94_e.html> accessed 4 January 2013.
[794] Norberto Carlos Darcy, *El Derecho Humano al Agua y su Recepción como Derecho Fundamental en Argentina* Documento de trabajo No 6. -2010 (Programa Regional de Apoyo a las Defensorías del Pueblo Iberoamericano & Agencia Española de Cooperación Internacional para el Desarrollo (AECID) 22-23 <http://www.portalfio.org/inicio/repositorio/documentos-trabajo/DT6_Norberto_Darcy_Argentina_ok.pdf> accessed 25 October 2012.
[795] Miguel Mathus Escorihuela, 'El Derecho al Agua en el Derecho Argentino' in Antonio Embid Irujo (ed), *El Derecho al Agua* (Editorial Aranzadi, Madrid 2006) 235.

implicitly incorporated in the right to an adequate standard of living (article 11), inextricably related to the right to health, the right to adequate housing and the right to adequate food, and should be seen in conjunction with the right to life and human dignity.[796] Along the same line, it is important to mention that the Argentine Supreme Court recognises the direct application of those treaties in the Argentine legal system, which means that the rights embraced therein are enforceable before the courts, without the need for other laws regulating or implementing them.[797] As a result, all human rights embraced in the ICESCR and in the other listed conventions have constitutional hierarchy and are directly enforceable before a court, according to the interpretation given to those rights.

The Argentine legal system follows the doctrine of unenumerated rights, which is embedded in article 33 of the Federal Constitution.[798] This provision stipulates that the rights and guarantees listed in the Constitution should not be interpreted as a denial of other rights and guarantees which are not enumerated. At the same time, this provision leaves open the possibility to recognise and protect additional rights, freedoms and guarantees, other than the ones listed in the Constitution, which could emerge following new human and social needs or which could be inferred from existing human rights.[799]

Some provinces have gone further than the federal state and have explicitly acknowledged the human right to water within their provincial legal order. For instance, the province of Entre Rios has included in its Constitution the fundamental right to water. [800] In the Autonomous city of Buenos Aires, Decree 303 of 2006 which terminated the concession contract on the provision of drinking water and sanitation, declared that 'while the concessionaire Aguas Argentinas considered drinking water as an economic good, the Argentine government expected that drinking water was also valued and managed as a social and cultural good, which in legal terms is translated as a fundamental right'.[801] Following Decree 303, the Autonomous city of Buenos Aires adopted a new regulatory framework for the provision of drinking water and sanitation

[796] UN CESCR 'General Comment 15, the right to water' (2002) UN Doc. E/C.12/2002/11, para 3.
[797] Victor Abramovich, 'Una Nueva Institucionalidad, Los tratados de Derechos Humanos en el Orden Constitucional Argentino' in Victor Abramovich, Alberto Bovino and Christian Courts (eds), *La Aplicación de los Tratados Sobre Derechos Humanos en el Ámbito Local (1994-2005). La Experiencia de una Década* (Editores del Puerto, Buenos Aires 2007) IV.
[798] Constitución Argentina, Artículo 33. "Las declaraciones, derechos y garantías que enumera la Constitución, no serán entendidos como negación de otros derechos y garantías no enumerados; pero que nacen del principio de la soberanía del pueblo y de la forma republicana de gobierno".
[799] German Bidart Campos, *Manual de la Constitución Reformada* (Tomo I Editar, Buenos Aires 1998) 325.
[800] Constitución de la Provincia de Entre Rios, Articulo 85 "…El agua es un recurso natural, colectivo y esencial para el desarrollo integral de las personas y la perdurabilidad de los ecosistemas. El acceso al agua saludable, potable y su saneamiento es un derecho humano fundamental. Se asegura a todos los habitantes la continua disponibilidad del recurso…"
[801] Decreto 303 de 2006 (adopted on 21 March 2006) Rescíndase el contrato de Concesión suscripto entre el Estado Nacional y la empresa Aguas Argentinas S.A., por culpa del Concesionario. Reasúmase transitoriamente la operación y la prestación del servicio, Preamble (translated by the author).

services through Law 26.221 of 2007. This Law declares in its preamble that 'access to water as a human right is a principle on which this regulatory framework is based. Therefore, the interpretation and application of this framework shall not lead to the transgression of this human right'. [802]

5.2.1.2. Mechanisms to protect the right to water

The Constitutional amendment of 1994 granted constitutional hierarchy to a particular judicial mechanism, known as *amparo* action (writ of protection). This judicial action was first adopted by the jurisprudence of the National Supreme Court of Justice, through two cases in 1957 and 1958. Then it was embodied in the federal Law 16.986 of 1966[803] and finally incorporated in the Federal Constitution in 1994. Law 16.986 regulated for the first time the *amparo action.* It stated that this judicial mechanism protected both explicit and implicit rights recognised in the Constitution, except the right to individual freedom, which is protected by the habeas corpus.[804] Article 43 of the Federal Constitution of 1994[805] states that *amparo* action is a prompt and summary action to protect rights and guarantees recognised in the Constitution, international conventions or national laws, provided that there is no other legal remedy more appropriate. This action may be filed by any person, for any act or omission of a public

[802] Ley 26.221 de 2007 (adopted on 13 February 2007, published on 28 February 2007) Apruébase el Convenio Tripartito suscrito el 12 de octubre de 2006 entre el Ministerio de Planificación Federal, Inversión Pública y Servicios, la Provincia de Buenos Aires y el Gobierno de la Ciudad Autónoma de Buenos Aires. Prestación del Servicio de Provisión de agua potable y colección de desagües cloacales. Sociedad Agua y Saneamientos Argentinos S.A. Disolución del E.T.O.S.S. Creación del Ente Regulador de Agua y Saneamiento y de la Agencia de Planificación. Marco Regulatorio. Preamble (translated by the author).

[803] Daniel Alberto Sabsay, 'El Amparo Como Garantía para la Defensa de los Derechos Fundamentales' (2000) 5 Revista de Derecho Procesal 24.

[804] Ley 16.986, Ley de Acción de Amparo (adopted on 18 October of 1966, published in the Official Journal on 20 October 1996), Artículo 1.

[805] Constitución Argentina, Artículo 43. "Toda persona puede interponer acción expedita y rápida de amparo, siempre que no exista otro medio judicial más idóneo, contra todo acto u omisión de autoridades públicas o de particulares, que en forma actual o inminente lesione, restrinja, altere o amenace, con arbitrariedad o ilegalidad manifiesta, derechos y garantías reconocidos por esta Constitución, un tratado o una ley. En el caso, el juez podrá declarar la inconstitucionalidad de la norma en que se funde el acto u omisión lesiva.

Podrán interponer esta acción contra cualquier forma de discriminación y en lo relativo a los derechos que protegen al ambiente, a la competencia, al usuario y al consumidor, así como a los derechos de incidencia colectiva en general, el afectado, el defensor del pueblo y las asociaciones que propendan a esos fines, registradas conforme a la ley, la que determinará los requisitos y formas de su organización.

Toda persona podrá interponer esta acción para tomar conocimiento de los datos a ella referidos y de su finalidad, que consten en registros o bancos de datos públicos, o los privados destinados a proveer informes, y en caso de falsedad o discriminación, para exigir la supresión, rectificación, confidencialidad o actualización de aquéllos. No podrá afectarse el secreto de las fuentes de información periodística.

Cuando el derecho lesionado, restringido, alterado o amenazado fuera la libertad física, o en caso de agravamiento ilegítimo en la forma o condiciones de detención, o en el de desaparición forzada de personas, la acción de hábeas corpus podrá ser interpuesta por el afectado o por cualquiera en su favor y el juez resolverá de inmediato, aun durante la vigencia del estado de sitio".

authority or individual that may currently or imminently damage, alter or threaten human rights in an arbitrary or illegal manner. A judge may declare the norm upon which the damaging action or omission is based as unconstitutional.

With the constitutional reform of 1994, the *amparo* action receives a broader application. Firstly, this action now protects not only the rights incorporated in the Constitution, but also rights incorporated in international treaties and laws. Secondly, this constitutional reform creates the possibility for the *amparo* action to protect collective rights. This is known as *collective amparo* action. This judicial mechanism can be used to claim the protection of collective rights, such as the right to a healthy environment, the rights of users and consumers or rights of general public interest. The *collective amparo* action can be brought by the persons directly affected, the ombudsman or associations aiming at the protection of collective rights.[806] Hence, the *amparo* action stands as the most suitable tool to effectively protect human rights, including the human right to water.

In general, the human right to water has been recognised as a derivative right in the jurisprudence of different provinces of Argentina when deciding on *amparo* actions. For instance, in a judgment adopted in the province of Cordoba addressing the contamination of drinking water wells by the treatment plant of the city, the judge ruled that access to drinking water is a derivative right, which is implicit in the right to health, recognised in the legal framework that regulates drinking water and sanitation services.[807] This judgment also mentioned that the right to health does not only cover medical assistance, but also preventive measures to avoid adverse effects to human health such as the provision of drinking water. In another case from the Autonomous city of Buenos Aires, the court declared that the right to water is a fundamental human right that must be respected, since it is an essential part of other rights, such as the right to life, human dignity, health and well-being.[808] In a case against the Province of Buenos Aires and the water provider, a group of citizens initiated an *amparo* action requesting the protection of the right to a healthy environment, on the grounds that the drinking water supply at their homes contained levels of arsenic and aluminium that exceeded the maximum level established by law. Although the judgment does not explicitly mention the human right to water, it granted the petition and ordered the defendants to ensure that the supplied drinking water complies with the standards established by law.[809]

[806] Argentine Constitution, Article 43.
[807] *Marchisio, Jose Bautista and others v Executive power of the municipality of Cordoba and the executive power of the Province of Cordoba*, amparo action, file No. 500003/36. First instance 8 judge in civil and comercial matters, Córdoba, 14 October 2005, para VIII.
[808] *Asociación Civil por la Igualdad y la Justicia v GCBA*, amparo action, file No. 20898/0, Court of Appeals in Administrative and Tax of the City of Buenos Aires -Sala 1., 18 July 2007, para XX.
[809] *Florit, Carlos Ariel and others v Provincia de Buenos Aires and Aguas Bonaerenses S.A*, amparo action, file No. 4650, Judge Administrative, 6 July 2010.

5.2.2. Chile

Chile is organised as a unitary but decentralised state. It is now divided into fifteen regions, each one identified with a roman numeral, except for the Santiago Metropolitan Region. Article 3 of the Constitution provides that the state's organs shall strengthen the regionalisation of the country and promote development based on equity and solidarity between the different regions of the country.

The Constitution that is still in effect today in Chile was adopted in 1980, during the dictatorial regime of General Augusto Pinochet. In 1990 democracy returned to Chile after being subjected for seventeen years to a military regime, which highly influenced the legal system of this country. One of the priorities of the dictatorial regime was to reverse the socialist economic policies of its predecessors. The primary instruments to achieve this goal were reaffirming security to property rights and establishing broad private economic rights accompanied by tight limits on state economic activities and regulation on markets.[810]

The Constitution offers a limited catalogue of rights and guarantees. What is remarkable about this catalogue is that it grants constitutional hierarchy to the right to private ownership of water resources. Article 19, numeral 24 of the Constitution provides that the right of individuals to use water resources, recognised or established in conformity with the law, confers to right holders the ownership over them.

During the military regime, in 1981, the Water Code was also reformed to move away from policies that granted great state authority over water use. According to Bauer, the Water Code was amended to reverse that trend by 'strengthening private property, increasing private autonomy in water use and favouring free markets in water rights to an unprecedented degree. It created several market mechanisms based on separating water rights from land ownership and attempted to foster a market mentality among users. As a corollary it sharply reduced the state's role in water management and regulation'.[811] This model favours the economic value of water, ensuring its private ownership in order to achieve economic optimisation.[812]

In Chile, water resources are considered to be national property of public use (article 595 of the Civil Code). However, the Water Code[813] authorises the state to grant water

[810] Carl J. Bauer, *Against the Current Privatization, Water Markets, and the State in Chile* (Kluwer Academic Publisher, Boston 1998) 15 and 17.
[811] Carl J. Bauer, *Against the Current Privatization, Water Markets, and the State in Chile* (Kluwer Academic Publisher, Boston 1998) 33.
[812] Luis Carlos Boub Concha, 'The Right to Water: Understanding its Economic, Social and Cultural Components as Development Factors for Indigenous Communities (2012) SUR International Journal on Human Rights 43.
[813] Decreto Con Fuerza de Ley 1122 (adopted 12 August 1981, published 29 October 1981) Fija Texto del Código de Aguas.

property rights over this resource, rights that are protected by the Constitution (article 19 No 24). It appears to be a legal anomaly in the Chilean legal system, since a resource that is considered national property for public use can be privatised. However, this conflict can be resolved by the principle *lex specialis derogat legi generali.* Indeed, the Civil Code explicitly adopts this principle, stating that the provisions of special codes prevail over the provisions of the Civil Code.[814] Since the Water Code is a special norm, its provisions allowing the privatisation of water prevail.

The Water Code of 1981 eliminated the previously existing priority list for allocating rights to water use. Formerly, priority was given to domestic and drinking water over agricultural use, industrial uses and electricity generation.[815] Currently, all uses are ranked at the same level. There is no legal preference among different types of water use. Gratuity and perpetuity are the two main characteristics of the right to water-use, since the state does not charge any fee for the allocation of such a right nor for its actual use, and the allocation is not made for a specific period of time. The holder of a right to water-use has the prerogative to use it or not; to make use of the resource for the purpose that he or she wishes; and to transfer the right of the land to which it serves independently, because water rights are separated from land ownership.[816] Unlike earlier laws, the Water Code of 1981 did not include an obligation to use water rights, nor was there a risk of loss or cancelation of the right due to lack of use.[817] However, the Water Code was modified in 2005 by Law 20.017, which introduced a fine for the non-use of water for which a right to use had been granted.[818] This fine was created to avoid hoarding and speculation.[819]

Thus, Chile treats water as a commodity, which is privately owned, and which is bought and sold in the market. Chile is the only country in Latin-America that considers water a commodity and where a water market exists. Additionally, the provision of drinking water and sanitation is now almost completely privatised in Chile.

Before the privatisation process started in Chile, drinking water and sanitation was provided by the state. In 1931 the General Directorate of Drinking Water and Sanitation (Dirección General de Agua Potable y Alcantarillado del Ministerio del Interior) was created, which marked the first steps towards an institutional development of these

[814] Codigo Civil, Articulo 4 (adopted since 14 December 1855)
[815] Lorenzo Soto Oyarzún, 'Chile' in Alejando O. Iza, and Marta B. Rovere (eds) *Gobernanza del Agua en América del Sur: Dimensión Ambiental* (IUCN Series de Política Y Derecho Ambiental No. 53, IUNC Unión Mundial para la Naturaleza, Gland 2006) 224. Also Nancy Yáñez and Raul Molina, *Las Aguas Indigenas en Chile* (LOM Ediciones, Santiago de Chile 2011) 152.
[816] Lorenzo Soto Oyarzún, 'Chile' in Alejando O. Iza, and Marta B. Rovere (eds) *Gobernanza del Agua en América del Sur: Dimensión Ambiental* (IUCN Series de Política Y Derecho Ambiental No. 53, IUNC Unión Mundial para la Naturaleza, Gland 2006) 224.
[817] Carl J. Bauer, *Against the Current Privatization, Water Markets, and the State in Chile* (Kluwer Academic Publisher, Boston 1998) 35.
[818] Codigo de Agua, Articulo 129 bis 4 and bis 5.
[819] Nancy Yáñez and Raul Molina, *Las Aguas Indigenas en Chile* (LOM Ediciones, Santiago de Chile 2011) 153.

services. In 1953 the General Directorate of Drinking Water and Sanitation, which belonged to the Ministry of the Interior, was merged with the Department of Hydraulic Works, which belonged to the Ministry of Public Works, to create the Directorate of Sanitation Works (Direccion de Obras Sanitarias, D.O.S.). The main functions assigned to this body were to study, plan, build, repair, maintain, operate, conserve, exploit, improve and manage water services and sewerage with state funds. The main reason for creating the D.O.S. was to unite all the abovementioned functions in one body. However, in practice this body shared its responsibilities with other institutions that belonged to different ministries.[820] As a result, the multiplicity of institutions that were dealing with the provision of drinking water and sanitation services in an uncoordinated manner led to the creation of the National Services of Sanitation Works (Servicio Nacional de Obras Sanitarias, SENDOS) in 1977. The government established this institution to merge all the previous bodies that had provided water and sanitation services. SENDOS was composed of a General Directorate and eleven Regional Directorates that operated in each of the administrative regions of the country, except for Region V and the Santiago Metropolitan Region. For the latter two regions, two autonomous state-owned companies[821] (Empresa de Obras Sanitarias de Valparaiso ESVAL, and Empresa Metropolitana de Obras Sanitarias EMOS) were created under the jurisdiction of SENDOS. This new institutional organisation led to a more coherent development of the services, an increase in the quality and quantity of the services, a more transparent use of the resources and a more direct control over the services, which were still subsidised by the state.[822] The state was directly involved in the provision of drinking water and sanitation services because of their natural characteristic as a monopoly and the need to grant significant subsidies for consumption.[823]

In the mid 1980's a study was carried out to assess the feasibility to separate the two roles that the state had assumed over water and sanitation. On the one hand, the state served as provider of drinking water and sanitation services; on the other hand, the state functioned to regulate and monitor the services and the service providers. It was proposed that the state needed to focus on this second, regulatory role.[824] As a result, a

[820] Gobierno de Chile, Superintendencia de Servicios Públicos, 'Historia del Sector Sanitario en Chile', <http://www.siss.gob.cl/577/w3-article-3681.html> accessed 13 February 2013.
[821] Eugenio Celedón Cariola, Maria Angelica Alegria, 'Análisis del Proceso de Privatización de los Sistemas de Agua Potable y Saneamiento Urbanos en Chile' (2004) 1 (2) Revista de Gestión del Agua de América Latina 66 and 67, <http://www.eclac.org/drni/noticias/documentosdetrabajo/5/24325/Rega2.pdf> accessed 13 February 2013.
[822] Eugenio Celedón Cariola, Maria Angelica Alegria, 'Análisis del Proceso de Privatización de los Sistemas de Agua Potable y Saneamiento Urbanos en Chile' (2004) 1 (2) Revista de Gestión del Agua de América Latina 67, <http://www.eclac.org/drni/noticias/documentosdetrabajo/5/24325/Rega2.pdf> accessed 13 February 2013.
[823] Biblioteca del Congreso Nacional de Chile, 'Historia de la Ley 19.549 Modifica el Régimen Jurídico Aplicable al Sector de los Servicios Sanitarios' (Presidential message, 9 May 1995) 6 <http://www.bcn.cl/histley/lfs/hdl-19549/HL19549.pdf> accessed 15 February 2013.
[824] Eugenio Celedón Cariola, Maria Angelica Alegria, 'Análisis del Proceso de Privatización de los Sistemas de Agua Potable y Saneamiento Urbanos en Chile' (2004) 1 (2) Revista de Gestión del Agua de

legislation package was enacted between 1988 and 1990 establishing a new regime for the provision of the services of drinking water and sanitation. This package of laws was adopted during the military dictatorship, a time when there was no parliament. This situation allowed the government to adopt these laws quickly. The main purpose of the transformation of the system was to hand over all public utility services to the private sector,[825] as had already been done with the electricity and telecommunication services.

With the adoption of this legislative reform, an independent regulatory authority was created by Law 18.902 of 1990, [826] the Superintendence of Sanitary Services (Superintendencia de Servicios Sanitarios, SISS). Further, a framework for the provision of drinking water and sanitation was established by Decree with Force of Law 382[827], which mandated that all providers of the mentioned services, whether public or private, will be regulated by the new concession regime. This Decree stated that the main purpose of the concession regime was to allow the establishment, construction and operation of public services of drinking water and sanitation. It also stated that the concession will be granted indefinitely to a limited number of private companies, while allowing the state the right to terminate the contracts under certain circumstances.

Furthermore, the state was authorised by Law 18.885[828] to develop business activities in the sector of drinking water and sanitation, through the founding of stock corporations. Based on this Law eleven companies were established, which corresponded with the administrative division of Chile at that time,[829] replacing SENDOS and its regional directorates.[830] As a result, water services were organised regionally and supervised by one national regulatory body the SISS. In its supervisory function, the SISS could impose fines or even close down the enterprise when a utility company infringes the obligations established by law.

By 1990, when democracy returned to Chile, drinking water services were still in the hands of the government and there was a political decision to stop all transfers of utility

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América Latina 67, <http://www.eclac.org/drni/noticias/documentosdetrabajo/5/24325/Rega2.pdf> accessed 13 February 2013

[825] Eugenio Celedón Cariola, Maria Angelica Alegria, 'Análisis del Proceso de Privatización de los Sistemas de Agua Potable y Saneamiento Urbanos en Chile' (2004) 1 (2) Revista de Gestión del Agua de América Latina 82.

[826] Ley 18.902 (adopted on 8 January 1989, published 27 January 1990) Crea la Superintendencia de Servicios Sanitarios. All Chilean legislation can be found in the Biblioteca del Congreso nacional de Chile <http://www.leychile.cl/Consulta>.

[827] Decreto con Fuerza de Ley 382 (adopted 30 December 1988, published 21 June 1989) Ley General de Servicios Sanitarios.

[828] Ley 18.885 (adopted 15 December 1989, published 12 January 1990), Autoriza al Estado para desarrollar actividades empresariales en material de agua potable y alcantarillado, y dispone la constitución de sociedades anónimas para tal efecto.

[829] It should be born in mind that Chile was composed of 13 regions until 2007, when region XIV and XV were created. Ley 20.174 (adopted 16 March 2007, published 5 April 2007) Créa la XIV Region de los Rios; Ley 20.175 (adopted 16 March, published 5 April 2007) Créa la XV Region de Arica y Parinacota.

[830] Ley 18885, Articulo 2,3, 12.

services from the public to the private sector.[831] According to Cariola and Alegría, the high percentage of persons supplied with drinking water in Chile – the highest percentage among Latin-American countries – is not a result of the privatisation process. Rather, it is the consequence of the early efforts of the state to improve the quality of life for its inhabitants through investment and the gradual improvement of public institutions and infrastructure.[832] This statement is confirmed by statistics from the Pan American Health Organization that indicate that by 1990 the proportion of the population using improved drinking water sources in Chile was 90 percent.[833] Although all the legislation adopted during the military dictatorship was designed to privatise the provision of drinking water, in 1990 the provision of this service was still completely in the hands of the state. All the achievements in this area where accomplished by the Chilean government without the involvement of the private sector.

The second democratically elected government in Chile set among its goals that by the year 2000, the end of its term, 100 percent of the urban population should have access to drinking water and sewage treatment systems, and that the percentage of the rural population that has access to drinking water and sewage treatment would significantly increase. The government also recognised that to achieve these goals, it would be necessary to invest large amounts of money and undertake technically and administratively complex projects. Therefore, it was determined that the participation of the private sector was required.[834] As a result, the legal framework for the provision of drinking water and sanitation was amended in 1998 by Law 19.549[835]. This Law introduced some modifications to avoid a monopoly in the provision of the service, as well as some new rules for the establishment of the tariffs. Following this law, the period of privatisation actually started. Nowadays, almost the entire provision of drinking water service is privatised. In fact, by 2002, the private sector and, more specifically, transnational consortia already owned 83 percent of the water utility companies in Chile.[836]

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[831] Eugenio Celedón Cariola, Maria Angelica Alegria, 'Análisis del Proceso de Privatización de los Sistemas de Agua Potable y Saneamiento Urbanos en Chile' (2004) 1 (2) Revista de Gestión del Agua de América Latina 83.

[832] Eugenio Celedón Cariola, Maria Angelica Alegria, 'Análisis del Proceso de Privatización de los Sistemas de Agua Potable y Saneamiento Urbanos en Chile' (2004) 1 (2) Revista de Gestión del Agua de América Latina 84.

[833] Pan American Health Organization, Regional Health Observatory Country statistic: Chile 1990, <http://new.paho.org/hq/index.php?option=com_content&view=article&id=3251&Itemid=2408&lang=en> accessed 15 February 2013.

[834] Biblioteca del Congreso Nacional de Chile, 'Historia de la Ley 19.549 Modifica el Régimen Jurídico Aplicable al Sector de los Servicios Sanitarios' (Presidential message, 9 May 1995) 7 <http://www.bcn.cl/histley/lfs/hdl-19549/HL19549.pdf> accessed 15 February 2013.

[835] Ley 19.549 (adopted 19 January 1998, published 4 February 1998) Modifica el Régimen Jurídico Aplicable al Sector de los Servicios Sanitarios.

[836] Sara Larraín, 'El Agua en Chile: Entre los Derechos Humanos y las Reglas del Mercado' (2006) 14 Revista Polis <http://polis.revues.org/5091#quotation> accessed 15 February 2013.

5.2.2.1. Recognition of the right to water

The fact that the Constitution of 1980 was adopted under a military dictatorship played a significant role in the restricted number of fundamental rights that this instrument recognises.[837] Article 19 of the Chilean Constitution embraces a catalogue of rights and guarantees for all individuals, most of which can be classified under the category of civil and political rights. It also includes three social and economic rights: the right to health, the right to education, and the right to social security. And it contains one collective right: the right to a healthy environment. Neither the Constitution nor the national legislation of Chile explicitly incorporates the human right to water. In contrast, the right to private ownership of this natural resource is a fundamental right enshrined in the Constitution.

Nevertheless, the catalogue of human rights included in the Constitution can be broadened with the rights and guarantees recognised in international conventions ratified by Chile, as happens in other jurisdictions. The amendment of 1989 added a new paragraph in article 5 of the Constitution concerning the sovereignty of the state. Article 5 already stipulated that the exercise of sovereignty recognises the respect of essential rights emanating from human nature as a limitation. The new paragraph reads: 'the organs of the state have the duty to respect and promote such rights, guaranteed by this Constitution as well as international conventions ratified by Chile that are enforced'. This means that the sovereignty of the state is also limited by the rights embedded in international conventions. Several questions emerge from the inclusion of this paragraph. To what extent do these rights have constitutional hierarchy? Are they above or below the constitution? Since the constitutional text does not regulate the hierarchical rank of international conventions, the jurisprudence has partially filled this gap. The interpretation of the new paragraph in article 5 of the Constitution has generated diverse opinions concerning the hierarchy of human rights embedded in international conventions.[838] On the one hand, the Supreme Court considers that rights included in international conventions on human rights ratified by Chile have constitutional hierarchy based on their automatic incorporation into the Constitution according to article 5.[839] This means that the human rights incorporated in international conventions ratified by Chile form part of the catalogue of fundamental rights establishing a

[837] Lorena Fires Monleón, 'Instituto Nacional de Derechos Humanos en Chile y sus Desafíos para Avanzar Hacia una Visión Integral en el Discurso y Practica de los Derechos Humanos en Chile', (2012) Anuario de Derechos Humanos 167, <http://www.anuariocdh.uchile.cl/index.php/ADH/article/viewFile/20572/21743> accessed 16 February 2013.

[838] Claudio Nash Rojas, *Derecho Internacional de los Derechos Humanos en Chile, Recepción y Aplicación en el Ámbito Interno* (Centro de Derechos Humanos, Universidad de Chile, Santiago de Chile 2012) 20.

[839] Claudio Nash Rojas, *Derecho Internacional de los Derechos Humanos en Chile, Recepción y Aplicación en el Ámbito Interno* (Centro de Derechos Humanos, Universidad de Chile, Santiago de Chile 2012) 20 and 47.

constitutional block.[840] On the other hand, the Constitutional Tribunal has objected to this interpretation since it would allow a modification of the Constitution without following the parliamentary process.[841] This discussion still exists; however, when the Supreme Court is deciding on a case it makes use of its own doctrine.

Chile has ratified a number of international conventions on human rights, among them: the International Covenant on Economic, Social and Cultural Rights on 27 May 1989, the Convention on the Elimination of All forms of Discrimination against Women on 17 July 1980, the Convention on the Rights of the Child on 27 January 1990 and the Convention on the Rights of Persons with Disabilities on 3 March 2007. According to the position of the Supreme Court these treaties enlarge the catalogue of human rights since they have constitutional hierarchy. As a result, under the ruling of the Supreme Court, the human right to water is recognised in the legal order of Chile, since this country has ratified international treaties that refer to this right.

5.2.2.2. Mechanisms to protect the right to water

Similar to other Latin American countries, Chile also has a specific judicial mechanism dedicated to protect fundamental rights, known as *recurso de protección* (recourse for protection). This action has constitutional hierarchy, since it is enshrined in article 20 of the Constitution. Based on this provision any individual can initiate an action for the protection of a fundamental right that has been violated, disturbed or threatened due to an arbitrary or illegal action or omission.

Before explaining the *recurso de protección* it is important to clarify that in the Chilean legal system a judicial mechanism known as *amparo* action also exists. However, the latter action bears no resemblance to the *amparo* action existing in other Latin American countries, such as in Argentina, Mexico, and Bolivia. Therefore, they should not be confused. In fact, the *amparo* action as defined in article 21 of the Chilean Constitution is equivalent to habeas corpus.

The *recurso de protección* (comparable to a writ of protection) is a very restricted judicial mechanism. This action is designed to protect only an exclusive number of rights and guarantees that are enshrined in article 19 of the Constitution. In other words, there is an exhaustive list of rights that can be safeguarded through this mechanism. Article 20 of the Constitution states that the rights and guarantees protected by the

[840] Nancy Yáñez and Raúl Molina, *Las Aguas Indigenas en Chile* (LOM Ediciones, Santiago de Chile 2011) 139. The Constitutional block means that the rights recognised in international human rights treaties have constitutional rank. See Claudio Nash Rojas, *Derecho Internacional de los Derechos Humanos en Chile* (Centro de Derecho Humanos, Universidad de Chile, Chile 2012)

[841] Nancy Yáñez and Raúl Molina, *Las Aguas Indigenas en Chile* (LOM Ediciones, Santiago de Chile 2011) 139. Also Claudio Nash Rojas, *Derecho Internacional de los Derechos Humanos en Chile, Recepción y Aplicación en el Ámbito Interno* (Centro de Derechos Humanos, Universidad de Chile, Santiago de Chile 2012) 20

recurso de proteccion are those established in Article 19 number 1, 2, 3 (paragraph 4), 4, 5, 6, 9 (final paragraph), 11, 12, 13, 15, 16, 19, 21, 22, 23, 24 and 25 of the Constitution. The list mainly refers to civil and political rights, among them are: the right to life, the right to equality before the law, the right to a fair trial, freedom of thought and conscience, freedom of speech and expression, freedom of religion, freedom of education, the right to association, the right to intellectual property and patents and the right to property, which includes the right to own water. It also includes the right to choose a health care system, but not the right to health. In addition, this action can be used to protect the right to a healthy environment (number 8 of article 19), when the right to live in an environment free from contamination has been affected by an illegal act or omission imputable to an authority or specific person.[842] The inclusion of the right to a healthy environment was an important innovation, particularly since it was one of the first countries in South America to incorporate this right in its legal system. All other constitutional rights not enumerated or listed, such as economic and social rights, are not protected by the *recurso de protección*, and must be enforced by means of ordinary judicial procedures.[843]

Recurso de protección can be initiated by any individual who suffers from violation, disturbance or threats in the legitimate exercise of the listed rights and guarantees under article 20, due to an arbitrary or illegal action or omission, whether by a state agency or a private party.[844] This action must be brought before the Courts of Appeal of the jurisdiction where the action or omission has taken place.[845] Appellate Courts are supposed to rule quickly and have the broad authority to order whatever measure they may judge necessary to re-establish the rule of law and the due protection of the affected person.[846] The action must be initiated within 30 days from the day when the action or omission occurred, or from the day when the situation was noticed. This procedure gives individuals only a very short time to seek protection. Moreover, the Appellate Courts, where the action must be filed, are only located in the main cities. Thus, individuals willing to take legal action to claim the protection of their fundamental rights might need to go to another city to file an action before the Appellate Court. Access to justice would be easier if the recourse for protection could be submitted before the judge of first instance, since they can easily be found in most municipalities.

[842] Chilean Constitution, Article 20.
[843] Allan R. Brewer-Carías, *Constitutional Protection of Human Rights in Latin America, a Comparative Study of Amparo Proceedings* (CUP, Cambridge 2009) 110.
[844] Carl J. Bauer, *Against the Current Privatization, Water Markets, and the State in Chile* (Kluwer Academic Publisher, Boston 1998) 21.
[845] Auto Acordado de la Corte Suprema (adopted on 24 June 1992, published 27 June 1992) Sobre Tramitación y Fallo del Recurso de Protección de las Garantías Constitucionales.
[846] Carl J. Bauer, *Against the Current Privatization, Water Markets, and the State in Chile* (Kluwer Academic Publisher, Boston 1998) 21.

The ruling of the Appellate Court can be appealed before the Supreme Court. If the final judgment is not complied with within the time set, the Appellate Court or the Supreme Court can force the private party or the state authority to comply by taking some measures such as a fine, suspension of the authority's functions, a private warning, among others remedies.[847] When deciding a *recurso de protección*, if the Appellate Court considers that the applicable statute in the case is unconstitutional, it cannot decide on the matter until it has referred the case to the Constitutional Tribunal to decide the constitutionality of the law.[848] One of the disadvantages of this action is its unpredictability. Although court decisions on a *recurso de protección* can be creative and flexible due to the broad authority that courts have under this action, not surprisingly those decisions can also be unpredictable, contradictory, or seemingly arbitrary. Also, in the Chilean system such decisions do not establish binding precedents for other cases.[849]

There is very little jurisprudence on *recurso de protección* actions that address the right to water. The judgments that examine such right opine that the right to water derives from the right to life, since water is indispensable for survival and the consequence of being without water is death.[850] The judgments that recognise a violation of the human right to water have been adopted by the Appellant Courts of Santiago and San Miguel, and they are quite recent, adopted in only the last two years. The Appellate Court of Santiago has protected the right to water as essential to the right to life, the right to health and the right to a healthy environment.[851] The Appellate Court of San Miguel has explicitly mentioned that the right to access to water is a fundamental right because it is essential and necessary for the development and existence of life, which is expressly protected in the Constitution under article 19 No. 1. In two different judgments the Appellate Court of San Miguel stated that the fundamental right to water derives from the right to life and is embedded in different international conventions of which Chile is a party. The Court explicitly mentions article 25 of the UDHR, articles 11 and 12 of the ICESCR, and General Comment 15 of the CESCR.[852]

These judgements reveal that some Chilean judges may be starting to support a broader interpretation of human rights, affirming that the right to water, which is recognised in international conventions ratified by Chile, derives from other recognised rights such as

[847] Auto Acordado de la Corte Suprema (adopted on 24 June 1992, published 27 June 1992) Sobre Tramitación y Fallo del Recurso de Protección de las Garantías Constitucionales, para 5, 15.
[848] Allan R. Brewer-Carías, *Constitutional Protection of Human Rights in Latin America, a Comparative Study of Amparo Proceedings* (CUP, Cambridge 2009) 111.
[849] Carl J. Bauer, *Against the Current Privatization, Water Markets, and the State in Chile* (Kluwer Academic Publisher, Boston 1998) 22.
[850] Court of Appeals of San Miguel, Recourse for protection, decision No. 113/2012, 8 June 2012; Court of Appeals of San Miguel, Recourse for protection, decision No. 101/2012, 14 October 2012; Court of Appeals of Santiago, Recourse for protection, decision No. 10140/2012, 28 June 2012.
[851] Court of Appeals of Santiago, Recourse for protection, decision No. 10140/2012, 28 June 2012.
[852] Court of Appeals of San Miguel, Recourse for protection, decision No. 113/2012, 8 June 2012; and Court of Appeals of San Miguel, Recourse for protection, decision No. 101/2012, 14 October 2012.

the right to life and the right to a healthy environment.[853] Given the restrictive character of the *recurso de protección*, this judicial mechanism can only be used to guarantee the right to water if that right is derived from any of the rights listed in article 20 of the Constitution. At this time, although there is a new direction in the recognition of the human right to water as a derivative right, such acknowledgement is not generally accepted.

Significantly, the right to privately own water is positively recognised as a constitutional right and protected by the *recurso de protección*. This right is granted to a limited number of people or companies depending on the availability of the resource, but regardless of the purpose of its use. As a result, it is possible that conflicts between individuals seeking protection of access to drinking water and individuals or enterprises claiming protection of a property right in water will arise.[854] If it is accepted that the right to water derives from the right to life, a clash between two constitutional rights, the right to life and the right to property can emerge. The resolution of such a conflict would be on a case by case basis in which the court balances the competing constitutional rights. To prevent this conflict from occurring, and to avoid the violation of the fundamental right to water, various constitutional reforms have been proposed that would modify article 19 number 24 of the Constitution, where the right to property ownership of water is embedded. Two new draft amendments have recently been proposed (one on 13 November 2012 and another on 18 April 2013) and are under review. Both would modify the mentioned article of the Constitution by recognising that access to water is a fundamental right; guaranteeing to all individuals safe water for personal and domestic use in a sufficient, acceptable and accessible manner; and declaring that the state has exclusive, absolute, and inalienable dominion over all water resources.[855] In this way the constitutional protection that exists today for private ownership of water would be eliminated, and a clear recognition of the human right to water would prevail.

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[853] Court of Appeals of San Miguel, Recourse for protection, decision No. 101/2011, 14 October 2011; Supreme Court, Appeal recourse for protection, decision No. 3.975/2005, 25 August 2005.

[854] There are already two cases concerning indigenous communities claiming the recognition of right to water-use, since the property rights granted to private companies (a bottling company and a sanitation company) were affecting their use for human consumption, animal grazing and irrigation. The cases were decided in favour of the indigenous communities based on the right to communal property (article 19, number 24 of the Constitution) and the ancestral right to water granted by law 19.253. These judgments do not examine at any time the issue of the human right to water. Supreme Court, Appeal, decision No. 986 of 2003, 22 March 2004; Supreme Court, Appeal, decision No. 2480/2008, 25 Novembre 2009.

[855] Cámara de Diputados de Chile, Proyecto de Ley: Reforma Constitucional que consagra el derecho al agua como derecho humano, ingreso el 13 de noviembre de 2012, está en primer trámite constitucional, (the draft amendment is still under consideration) <http://www.camara.cl/pley/pley_detalle.aspx?prmID=9082&prmBL=8678-07> accessed on 2 October 2013; Cámara de Diputados de Chile, Proyecto de Ley: Reforma Constitucional, sobre derecho al agua, ingreso el 18 de abril de 2013, está en primer trámite constitucional, (the draft amendment is still under consideration) <http://www.camara.cl/pley/pley_detalle.aspx?prmID=9305&prmBL=8898-07> accessed 2 October 2013.

5.2.3. Colombia

The Political Constitution of Colombia was significantly amended in 1991, replacing the constitution of 1886. Previously in Colombia, the state had the monopoly of drinking water and sanitation services. In the 1980's these services were decentralised and municipalities started to assume the responsibility, a duty that was confirmed by the new Constitution.[856] At the beginning of the 1990's Colombia was in a reform process under the auspices of the World Bank, whose main objective was to reduce the level of state intervention in the market. This process coincided with the reform of the Constitution of 1991 that limited state regulation of the provision of public services. These reforms opened the door to a change in water management; Colombia moved from a state monopoly over water supply systems to a competitive market for water supply with a large participation by private companies. This situation allowed the state to reassume its main functions of monitoring and regulation.[857] Nowadays, drinking water services can be provided directly by the state or indirectly through private companies or mixed public-private companies.[858] With the adoption of the Constitution of 1991, the privatisation of public services, such as drinking water, sewage systems, electricity and gas, started to be consolidated.[859]

The Constitution of 1991 stipulates that Colombia is a social state and places on the state several obligations to its citizens. For instance, article 334 of the Constitution provides that because the state is in charge of the general economy of the country, it needs to intervene in certain economic activities, such as the provision of private and public services, with the purposes of improving the quality of life of its inhabitants, creating an equitable distribution of opportunities and benefits, and preserving a healthy environment. Article 365 of the Constitution stipulates that public services are inherent to the social purpose of the state. And article 366 of the Constitution stipulates that a basic objective of the state is to address the unsatisfied needs of its population, including health, education, environmental sanitation and drinking water. For this

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[856] Colombian Constitution, Article 288; República de Colombia, Consejo Nacional de Política Económica y Social (CONPES), 'Documento Conpes 3253 Importancia Estratégica del Programa de Modernización Empresarial en el Sector de Agua Potable y Saneamiento Básico' (10 November 2010) 3 <http://www.minvivienda.gov.co/Ministerio/Normativa/Agua/CONPES%20RELACIONADOS%20CON%20AGUA%20Y%20SANEAMIENTO/3253.pdf> accessed 22 March 2013.

[857] Luis Eduardo Amador Cabra, *Los Servicios Públicos frente a las Reformas Económicas en Colombia* (Universidad Externado de Colombia, Bogotá 2011) 18.

[858] Julio Cesar Gamba Ladino, 'Régimen Constitucional Colombiano del Servicio Público' in David Cienfuegos Salgado and Luis Gerardo Rodriguez (eds), Actualidad de los Servicios Públicos en Iberoamérica (Universidad Nacional Autónoma de Mexico, Mexico 2008) 234 <http://biblio.juridicas.unam.mx/libros/6/2544/12.pdf> accessed 10 September 2013.

[859] Julio Cesar Gamba Ladino, 'Régimen Constitucional Colombiano del Servicio Público' in David Cienfuegos Salgado and Luis Gerardo Rodriguez (eds), Actualidad de los Servicios Públicos en Iberoamérica (Universidad Nacional Autónoma de Mexico, Mexico 2008) 234 <http://biblio.juridicas.unam.mx/libros/6/2544/12.pdf> accessed 10 September 2013.

purpose social public spending must be given priority over other assignments in plans and budgets.

In 1994, Law 142 was adopted to regulate the provision of household utilities and promote the participation of the private sector in this area.[860] The privatisation process started in 1995, when private companies were incorporated to manage the water utilities in the cities of Cartagena and Barranquilla.[861] This process was followed by other municipalities. Nevertheless, in the major cities of Colombia - Bogotá, Cali and Medellin - these services are still provided through public companies.

5.2.3.1. Recognition of the right to water

The Constitution of 1991 recognises the protection of a large number of human rights, which are enshrined in the Constitution under one title and divided into three different groups: 1) fundamental rights; 2) social, economic and cultural rights; and 3) collective and environmental rights.[862]

The constitutional reform of 1991 adopted two provisions that give special relevance to human rights within the Colombian legal system. The first provision is article 93; which stipulates that the international conventions and agreements on human rights that Colombia has ratified are supreme and prevail over all other laws in the national legal system. Article 93 also states that the rights and duties mentioned in the Constitution will be interpreted in accordance with international treaties on human rights ratified by Colombia.[863] The notion of the prevalence of international conventions on human rights and international humanitarian law has been interpreted by the Constitutional Court as creating a 'constitutional block' (bloque de constitucionalidad), which overrides national law.[864] In other words, the mentioned conventions are superior to national law

[860] República de Colombia, Consejo Nacional de Política Económica y Social (CONPES), 'Documento Conpes 3253 Importancia Estratégica del Programa de Modernización Empresarial en el Sector de Agua Potable y Saneamiento Básico' (10 November 2010) 3.

[861] Menahem Libhaber, Fernando Troyano and Luis Fernando Ulloa 'Improving Water and Sanitation services in Colombian Municipalities Through Private Operators' (2004) 50 En Breve <http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2010/04/06/000333037_20100406025555/Rendered/PDF/307300ENGLISH010Box345628B01PUBLIC1.pdf> accessed 22 March 2013.

[862] Although the Constitution recognises a large range of human rights, it does not explicitly embrace the human right to water.

[863] Colombian Constitution, Article 93.

[864] "El bloque de constitucionalidad está compuesto por aquellas normas y principios que, sin aparecer formalmente en el articulado del texto constitucional, son utilizados como parámetros del control de constitucionalidad de las leyes, por cuanto han sido normativamente integrados a la Constitución, por diversas vías y por mandato de la propia Constitución. Son pues verdaderos principios y reglas de valor constitucional, esto es, son normas situadas en el nivel constitucional, a pesar de que puedan a veces contener mecanismos de reforma diversos al de las normas del articulado constitucional *stricto sensu.* En tales circunstancias, la Corte Constitucional coincide con la Vista Fiscal en que el único sentido razonable que se puede conferir a la noción de prevalencia de los tratados de derechos humanos y de derecho internacional humanitario (CP arts 93 y 214 numeral 2º) es que éstos forman con el resto del texto constitucional un "bloque de constitucionalidad", cuyo respeto se impone a la ley. En efecto, de esa

and have the same hierarchal rank as the Constitution, without being above the Constitution. The existing national legal system must be compatible with the provisions of the international conventions on human rights, at least those to which Colombia is a party.[865] Colombia is a party to the ICESCR, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities.[866] Moreover, the Constitutional Court has ruled that the general comments, recommendations and observations issued by the UN treaty bodies are relevant to determine the legal content and meaning of the rights embraced in the Constitution. Although these documents are not considered to be part of the 'constitutional block', they are a relevant hermeneutical criterion for the rights embraced therein, and a limitation on the legislature.[867]

The second relevant provision is article 94, which enunciates that the rights and guarantees contained in the Constitution and in ratified international agreements should not be understood as a denial of other rights that are not expressly mentioned therein.[868] This constitutional provision establishes what is known as the clause of unenumerated rights. By virtue of this clause it is possible to protect certain rights that, although not explicitly included in the text of the Constitution, derive from other rights or constitutional principles.[869] A clear example of an unenumerated right protected by the Colombian Constitutional Court is the right to subsistence.[870]

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manera se armoniza plenamente el principio de supremacía de la Constitución, como norma de normas (CP art. 4º), con la prevalencia de los tratados ratificados por Colombia, que reconocen los derechos humanos y prohíben su limitación en los estados de excepción (CP art. 93)". Colombian Constitutional Court, C-225 of 1995, Judge Rapporteur Alejandro Martinez Caballero, 18 May 1995, para 12. All decisions adopted by the Constitutional Court of Colombia can be found in its institutional website http://www.corteconstitucional.gov.co/relatoria.

[865] Colombian Constitutional Court, C-225/95, Judge Rapporteur Alejandro Martinez Caballero, 18 May 1995.

[866] International Covenant on Economic Social and Cultural rights ratified on 29 October 1969; the Convention on the Elimination of all Forms of Discrimination against Women ratified on 18 January 1982; the Convention on the Rights of the Child ratified on 28 January 1991; and the Convention on the Rights of Persons with Disabilities ratified on 10 May 2011.

[867] Colombian Constitucional Court, *Tutela*, T-616 de 2010, Judge Rapporteur: Luis Ernesto Vargas Silva, 5 August 2010, para 2.4.

[868] Colombian Constitution, Article 94.

[869] Manuel Fernando Quinche Ramírez, *Derecho Constitucional Colombiano de la Carta de 1991 y sus Reformas.* (Colección Textos de Jurisprudencia, 3 edn Editorial Universidad del Rosario, Bogota 2009) 117. Jimena Sierra Camargo, 'La impunidad en los Delitos de Violencia Sexual Contra niñas y adolescentes como consecuencia de la presencia de la estructura patriarcal en el derecho Colombiano' In Beatriz Londoño Toro y Diana Maria Gomez Hoyos (eds) *Diez Años de Investigación Jurídica y Socio jurídica en Colombia: Balances desde la RED Socio jurídica* (Tomo II, Universidad de la Sabana y Editorial Universidad del Rosario, Bogota 2010) 359.

[870] "Derecho a la subsistencia. Aunque la Constitución no consagra un derecho a la subsistencia éste puede deducirse de los derechos a la vida, a la salud, al trabajo y a la asistencia o a la seguridad social. La persona requiere de un mínimo de elementos materiales para subsistir. La consagración de derechos fundamentales en la Constitución busca garantizar las condiciones económicas y espirituales necesarias para la dignificación de la persona humana y el libre desarrollo de su personalidad". Colombian Constitutional Court, T-426 of 1992, Judge Rapporteur: Eduardo Cifuentes Muñoz, 24 June 1992.

The Constitutional Court asserts that according to article 93 of the Constitution, the legal nature of the right to water must be understood in the light of international treaties ratified by Colombia. Several international treaties oblige the state to recognise the right to water, such as articles 11 and 12 of the ICESCR, article 24 of the Convention on the Rights of the Child, article 14 of the Convention on the Elimination of All forms of Discrimination against Women, and article 18 of the Convention on the Rights of Persons with Disabilities (T-614 of 2010).[871] According to the Constitutional Court the right to water is a fundamental right, and the lack of the public service of drinking water directly affects the right to life (T-578 of 1992 and T-410 of 2003).[872] Access to water acquires the character of a fundamental right when water is used for human consumption, or when it otherwise affects the right to life, the right to health or public health (T-312 of 2012).[873]

The Constitutional Court has recognised the right to water as a fundamental right. The court has expressed the view that the fundamental right to water is a prerequisite for the realisation of other fundamental rights, such as the right to life, the right to a healthy environment and the right to health. Therefore, when water is used for human consumption it is necessary to ensure its immediate protection (T-614 of 2010).[874] The Constitutional Court has also interpreted the right to water according to the General Comment 15, adopted by the CESCR, which establishes that 'the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses' (T-916 of 2011).[875]

[871] Colombian Constitutional Court, T-614 of 2010, Judge Rapporteur: Luis Ernesto Vargas Silva, 5 August 2010, paras 3.2 -3.3.3.

[872] "En principio, el agua constituye fuente de vida y la falta del servicio atenta directamente con el derecho fundamental a la vida de las personas. Así pues, el servicio público domiciliario de acueducto y alcantarillado en tanto que afecta la vida de las personas (CP art. 11), la salubridad pública (CP arts. 365 y 366) o la salud (CP art. 49) es un derecho constitucional fundamental y como tal ser objeto de protección a través de la acción de tutela". Colombian Constitutional Court, T-578 of 1992, Judge Rapporteur: Alejandro Martínez Caballero, 3 November 1992; Colombian Constitutional Court, T-410 of 2003, Judge Rapporteur: Jaime Córdoba Triviño, 22 May 2003.

[873] La Corte desde su primera jurisprudencia ha establecido que el agua es un derecho fundamental, si la misma está destinada al consumo humano. Así fue instituido en la sentencia T-578 de 1992 en la que afirmó: 'En principio, el agua constituye fuente de vida y la falta de servicio atenta directamente con el derecho fundamental a la vida de las personas. Así pues, el servicio publica domiciliario de acueducto y alcantarillado en tanto que afecta la vida de las personas (CP art. 11), la salubridad pública (CP arts. 365 y 366), o la salud (CP art. 49), es un derecho constitucional fundamental'". Colombian Constitutional Court T-312 of 2012, Judge Rapporteur: Luis Ernesto Vargas Silva, 26 April 2012, para 5. See also Colombian Constitutional Court, T-578 of 1992, Judge Rapporteur: Alejandro Martínez Caballero, 3 November 1992; and Colombian Constitutional Court, T-410 of 2003, Judge Rapporteur: Jaime Córdoba Triviño, 22 May 2003.

[874] Colombian Constitutional Court, T-614 of 2010, Judge Rapporteur: Luis Ernesto Vargas Silva, 5 August 2010,para 3.4.

[875] Colombian Constitutional Court, T-916 of 2011, Judge Rapporteur: Jorge Ignacio Pretelt Chaljub, 7 December 2011, para 6.3.2.

5.2.3.2. Mechanisms to protect the right to water

The Constitution of 1991 also brought two judicial mechanisms to protect human rights that were a novelty in the Colombian legal system, namely: the popular action and the *acción de tutela* (hereinafter *tutela* action). The popular action was adopted for the protection of collective rights and interests, and the latter for the protection of individual fundamental rights.

The popular action is embraced in article 88 of the Constitution and regulated by Law 472 of 1998.[876] Popular action is defined as a judicial mechanism to avoid a potential risk, to stop a danger, a threat, a peril or a violation of collective rights or interests, or to restore things to the previous state whenever possible.[877] In its article 9, Law 472 states that this judicial mechanism proceeds against any action or omission of a public authority or an individual that has violated or threatens to violate collective rights or interests.[878] Law 472 provides a non-exhaustive list of collective rights and interests that can be protected through this judicial mechanism, such as: access to public services; the right to a healthy environment; management of natural resources to guarantee their sustainable development, conservation, restoration and substitution; public health and security; and consumer rights.

The *tutela* action is the second judicial mechanism used to protect human rights. According to article 86 of the Constitution the main purpose of the *tutela* action is the immediate protection of the fundamental constitutional rights of any individual when these rights have been violated or threatened by an act or omission of any public authority, and in cases where the law stipulates by an act or omission of an individual. The *tutela* action can only proceed when the affected individual does not have any another judicial mechanism to claim the protection of his or her rights, or when it is used as a temporary mechanism to avoid an irreparable harm.[879] In any event, no more than 10 days can elapse between the request for protection and its resolution.[880] The *tutela* action is similar to the judicial mechanism of what is known in other Latin-American countries as the *amparo* action, since both mechanisms are designed for the protection of human rights and share a similar fast procedure.

Two particular issues with the *tutela* action merit some discussion. First, a *tutela* action is generally available only to protect fundamental rights. The Constitution of 1991 has a complete title dedicated to human rights, guarantees and obligations, and it classifies

[876] Ley 472 de 1998 (adopted on 5 August 1998, published on 6 August 1998), por la cual se desarrolla el artículo 88 de la Constitución Política de Colombia en relación con el ejercicio de las acciones populares y de grupo y se dictan otras disposiciones, <http://www.secretariasenado.gov.co/senado/basedoc/ley/1998/ley_0472_1998.html> accessed 20 January 2013.
[877] Ley 472 de 1998, Artículo 2.
[878] Ley 472 de 1998, Artículo 9.
[879] Colombian Constitution, Article 86.
[880] Colombian Constitution, Article 86.

human rights into three main groups: 1) fundamental rights; 2) social, economic and cultural rights; and 3) collective and environmental rights. The main objective of a *tutela* action is to safeguard fundamental rights, meaning those rights classified under the first group. Therefore, in principle, other rights such as economic, social and cultural rights and the collective rights are not subject to protection under this judicial action. Nevertheless, the Constitutional Court has ruled that certain other human rights, though not classified as fundamental rights in the Constitution, can also be protected through the *tutela* action. Under the doctrine of fundamental rights for connection[881] non-fundamental rights may receive protection under a *tutela* action by virtue of their intimate and inseparable connection with other fundamental rights. The logic behind this doctrine is simple. If a close connection exists between a fundamental and a non-fundamental right, and the non-fundamental right is threatened, unless there is immediate redress, a violation of the fundamental right might occur.[882] For example, the right to health in principle is not a fundamental right. But the absence of adequate health care may threaten the right to life of an individual, which is a fundamental right (T-491 of 1992).[883] Because of the intimate connection that exists between the right to health and the right to life, the right to health can be protected through a *tutela* action; otherwise, the right to life could also be violated. Likewise, the Constitutional Court has allowed collective rights, such as the right to a healthy environment, which in principle should be protected by a popular action, to be protected through a *tutela* action. Thus, although the popular action is the more appropriate judicial mechanism for the protection of a collective right, the *tutela* action will be more appropriate when it is necessary to protect both a collective and a fundamental right simultaneously. A clear example is the one related to the protection of a common interest such as the preservation of a healthy environment. Given that environmental contamination may affect the right to life, once a connection between the fundamental right and the infringement of the collective right has been demonstrated, priority must be given to the *tutela* action in order to promptly protect both kinds of rights (fundamental and collective rights) (T-410 of 2003). [884]

[881] Mauricio Garcia Villegas y Cesar Rodriguez, 'La Acción de Tutela' in Boaventura de Sousa Santos y Mauricio Garcia Villegas, *El Caleidoscopio de las Justicias en Colombia* (Tomo I, Siglo del Hombre Editores y Universidad de los Andes, Bogota 2001) 423.

[882] "Los derechos fundamentales por conexidad son aquellos que no siendo denominados como tales en el texto constitucional, sin embargo, les es comunicada esta calificación en virtud de la íntima e inescindible relación con otros derechos fundamentales, de forma que si no fueron protegidos en forma inmediata los primeros se ocasionaría la vulneración o amenaza de los segundos". Colombian Constitutional Court, T-571 of 1992, Judge Rapporteur: Jaime Sanin Greiffenstein, 26 October 1992.

[883] Colombian Constitutional Court, T-491 of 1992, Judge Rapporteur: Eduardo Cifuentes Muñoz, 13 August 1992.

[884] Colombian Constitutional Court, C-215 of 1999, Judge Rapporteur: Martha Victoria Sáchica de Mocaleano, 14 April 1999; Colombian Constitutional Court, T-410 of 2003, Judge Rapporteur: Jaime Córdoba Triviño, 22 Mayo 2003.

The second issue of the *tutela* action is that the final judicial decision may be revised by the Constitutional Court. According to Decree 2591 of 1991[885], which regulate the *tutela* action, a judicial decision taken in a *tutela* action, can be challenged within the three days following the judgement. If the judgment is not contested, or after the decision has been contested, the final judgment must be sent to the Constitutional Court for possible revision. Under the revision procedure, two magistrates of the Constitutional Court select several *tutela* decisions to be revised. The magistrates do not need to state their reasons for selecting the decision for revision. Also, any other magistrate of this Court or the Ombudsman can request that a specific decision be revised.[886] In other words, not all *tutela* decisions are revised by the Constitutional Court, only the ones that the magistrates consider relevant.

Article 35 of Decree 2591 of 1991 provides that the judicial decision taken by the Constitutional Court in a revision can: a) revoke or amend the revised decision; b) unify the jurisprudence of the Constitutional Court; or c) clarify the general scope of a constitutional norm. In any of these cases there must be reasoning for the decision.

The revision of a *tutela* has a devolutive effect. Therefore, the decision taken by the Constitutional Court must be immediately made known to the competent judge, who must notify the parties of the case and take the necessary measures to comply with the judgment. In addition, a revision only produces effects for the concrete revised case.[887] In certain circumstances the Constitutional Court can decide to join a number of *tutela* decisions for revision when they are very similar in their facts and in the claims made by the applicants. Accordingly all joined cases will be revised in one general decision.

Overall, access to safe drinking water can be protected through two judicial actions in the Colombian system: *tutela* actions and popular actions. The *tutela* action is aimed at safeguarding fundamental rights, and the right to water has been recognised as such by the Constitutional Court when water is used for human consumption.[888] The popular action protects collective rights, including access to public services, such as the supply of drinking water. There are a number of judgments based on popular actions which serve to protect the right to water.[889]

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[885] Decreto 2591 de 1991 (adoptado el 10 de noviembre de 1991), por el cual se reglamenta la acción de tutela consagrada en el artículo 86 de la Constitución Política, Articles 31-36 <http://www.secretariasenado.gov.co/senado/basedoc/decreto/1991/decreto_2591_1991.html> accessed 29 January 2013.

[886] Decreto 2591 de 1991, Artículo 33.

[887] Decreto 2591 de 1991, Artículo 36.

[888] Colombian Constitutional Court, T-616 of 2010, Judge Rapporteur: Luis Ernesto Vargas Silva, 5 de August 2010, para II (1.2).

[889] Council of State, *Defensoria del Pueblo v Municipio de Neiva y otros.* file No.: 41001-23-31-000-2000-3518-01(AP-162) 14 September 2001; Council of State, *Diana Sirley Pineda Garcia y otros v Corporacion Autonoma Regional del Valle del Causa,* file No.: 76001-23-31-000-2004-00212-01(AP) 4 February 2010; Council of Estate, *Nestor Gregory Dias Rodriguez v Minicipio de Ataco,*file No. 73001-

Although, Colombia does not explicitly enshrine the human right to water within its Constitution or legislation, this right is recognised by the jurisprudence of the Constitutional Court. The Colombian Constitutional Court has been characterised as a progressive court. It demonstrated so by recognising, since the beginning of its work, the importance of having access to drinking water. The Court has indicated that water is a source of life, and the lack of this service directly affects the fundamental right to life. Therefore, the public residential service of drinking water and sanitation is a fundamental constitutional right and must be protected as such (T-578 of 1992).[890] The Constitutional Court has enhanced support for the right to water through its jurisprudence. For the Constitutional Court it is undeniable that water when intended for human consumption is a fundamental right (T-616 of 2010).[891]

5.2.4. Bolivia

In 2009 the Bolivian constitution[892] was replaced after a long process of discussions and social mobilisations that started in 2006. As a consequence of this reform, the new Constitution recognises Bolivia as a plurinational state.[893] This implies the recognition of indigenous peoples, Afrobolivians and Bolivians, who together constitute the people of Bolivia. In Bolivia there are at least 36 cultural groups that make up the structure of the state.[894] One of the fundamental principles of plurinationality is the human dignity of individuals and also of groups.[895] The new characteristic of the Bolivian state denotes more participation of the different groups in the structure and organisation of the state. The Constitution recognises legal pluralism, and proclaims the coexistence of various legal systems in the framework of a plurinational state.[896] One example of this legal

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23-31-000-2001-3814-01(AP-350) 19 July 2002 <http://www.ramajudicial.gov.co/csj/> accessed 20 April 2013.

[890] Colombian Constitutional Court, T-578 of 1992, Judge Rapporteur: Alejandro Martinez Caballero, 3 November 1992.

[891] Colombian Constitutional Court, T-616 of 2010, Judge Rapporteur: Luis Ernesto Vargas Silva, 5 de August 2010, para II (1.2).

[892] Bolivian Constitution (adopted on 25 January 2009 by referendum, and published on 7 February 2009).

[893] Bolivian Constitution, Article 1.

[894] Alvaro Garcia Linera, Preámbulo, (Memoria Conferencia International Hacia la Construcción del Tribunal Constitucional Plurinacional 30-31 Agosto y 1 Septiembre de 2010) 4 <http://saludpublica.bvsp.org.bo/textocompleto/bvsp/boxp68/tribunal-constitucional-construccion.pdf> accessed 28 February 2013.

[895] J. Alberto del Real Alcalá, 'La Construcción de la "Plurinacionalidad" Desde Las Resoluciones del Nuevo Tribunal Constitucional Plurinacional de Bolivia: Desafíos y Resistencias' (Memoria Conferencia International Hacia la Construcción del Tribunal Constitucional Plurinacional 30-31 Agosto y 1 Septiembre de 2010) 109 <http://saludpublica.bvsp.org.bo/textocompleto/bvsp/boxp68/tribunal-constitucional-construccion.pdf> accessed 28 February 2013.

[896] Bolivian Constitution, Article 1, 178; Ley 027 (adopted 6 July 2010) Ley del Tribunal Constitucional Plurinacional, Artículo 3.

pluralism is the coexistence of the ordinary Bolivian justice system next to the indigenous justice system (*Justicia indígena Ordinaria Campesina*).[897]

Many of the provisions adopted in the actual Bolivian Constitution are the result of different claims made by indigenous groups and low income groups of population. Other provisions were adopted in response to specific events or circumstances that negatively affected different groups of inhabitants, including the privatisation of drinking water and sanitation services, and particularly the water war that took place in Cochabamba, which will be explained below.

The first water utility companies in Bolivia were created in the 1960's after a Presidential Decree of 1964 authorised it. Based on that Decree, the following companies were established: SELA in Oruro (1964), ELAPAS in Sucre (1965), SAMAPA in La Paz (1966) and SEMAPA in Cochabamba (1967), which were decentralised public companies, accountable to the central government, with a board of directors headed by the mayor of the respective city.[898] These companies provided water in the major cities, while small-scale providers, such as truck vendors, provided water in poorer neighbourhoods where households were not connected to the public water system. In addition, a large number of cooperatives operated in small cities, towns and rural areas, supplying water.[899]

The percentage of the Bolivian population supplied with public drinking water coverage in Bolivia was very low. Expansion of the water system required financing, which was mainly provided by international financial institutions (IFI) in the form of loans. However, in the framework of the structural adjustment programme introduced in 1984, the World Bank and IFIs began to strongly promote private sector participation as an alternative.[900]

Access to water became a major issue when Bolivia introduced a national plan to expand drinking water coverage in urban areas. The Bolivian National Plan of Drinking Water and Sewage Systems 1992-2000, known as 'Programme Water for All', mandated the provision of universal access to in-house tap water on a national basis.[901] As part of this Plan it was decided to update and implement national laws and regulations. A legal framework for the provision of drinking water and sanitation services, which encouraged privatisation, was adopted in different phases. The first

[897] Bolivian Constitution, Articles 30, 90.
[898] Andrew Nickson and Claudia Vargas, 'The limitations of Water Regulation: The Failure of the Cochabamba Concession in Bolivia' (2002) 21 (1) Bulleting of Latin American Research 101.
[899] Andrew Nickson and Claudia Vargas, 'The limitations of Water Regulation: The Failure of the Cochabamba Concession in Bolivia' (2002) 21 (1) Bulleting of Latin American Research 101.
[900] Andrew Nickson and Claudia Vargas, 'The limitations of Water Regulation: The Failure of the Cochabamba Concession in Bolivia' (2002) 21 (1) Bulleting of Latin American Research 102
[901] Bronwen Morgan, *Water on Tap: Rights and Regulation in the Transnational Governance of Urban Water Services* (CUP, Cambridge 2011) 93.

phase was the adoption of Regulation 510 enacted in 1992[902], which regulates the provision of these services in urban areas, and the relationship between utility companies and users. This regulation provides that the state has the ownership of freshwater resources, and that utility companies are in charge of capturing, transporting, storing, treating and distributing water for the population in their respective jurisdictions. It also provides that any individual or entity, whether public or private, that has or wishes to have its own water supply system (for instance private wells), must request and obtain an express authorisation to do so from the company. An agreement concerning the tariff and payment for the use of the resource would need to be signed.[903] In the second phase, a national system for regulating public utility services (Sistema de Regulación Sectorial, SIRESE) was adopted in 1994. The system was created to regulate, control and supervise activities in the following sectors: telecommunications, electricity, hydrocarbons, transport, and water services.[904] This system comprised a separate superintendence for each sector and a general superintendent to direct them. During the third phase, a regulation for the organisation and concession of the water sector was adopted in 1997.[905] This instrument established the superintendence functions in water services, and laid down the procedures for awarding concessions for the provision of drinking water and sanitation services. Article 7 of this regulation empowered the superintendence of water not only to grant concessions for the provision of drinking water and sewage services, but also to grant concessions for the use of water resources in general.[906]

In 1997, the private sector became involved in the provision of water in the urban area when a subsidiary of the large French water multinational Suez S.A. secured a long-term concession contract to deliver water in the capital city, La Paz.[907] Later, another privatisation was achieved: *Aguas del Tunarí,*[908] a Bechtel's subsidiary was granted a concession contract on 3 September 1999 for the city of Cochabamba. The concession contemplated tariff increases and the exclusive use of water resources.

[902] Resolución Ministerial 510 (adopted 29 October, published 29 October1992) Reglamento Nacional de Prestación de Servicios de Agua Potable y Alcantarillado para Centros Urbanos (hereinafter Regulation 510).
[903] Resolución Ministerial 510 de 1992, Artículo 63.
[904] Ley 1600 (adopted 28 October 1994, 2published 28 October 1994) del Sistema de Regulación Sectorial (SIRESE), Artículo 1.
[905] Decreto Supremo 24716 (adopted 22 July 1997, published 24 July 1997) Aprueba Reglamento de la Organización Institucional y de las Concesiones del Sector de Aguas y el Reglamento de Uso de Bienes de Dominio Público y de Servidumbres para Servicios de Aguas.
[906] Decreto Supremo 24716, Artículo 7.
[907] Bronwen Morgan, *Water on Tap: Rights and Regulation in the Transnational Governance of Urban Water Services* (CUP, Cambridge 2011) 94.
[908] A multinational consortium that was owned by International Water, a joint enterprise of United Utilities (UK) and the San Francisco-Based giant Bechtel. Bronwen Morgan, *Water on Tap: Rights and Regulation in the Transnational Governance of Urban Water Services* (CUP, Cambridge 2011) 88.

Afterwards, at the end of 1999, Law 2029[909] on drinking water service and sewerage system was adopted. It created the Sectorial Superintendence of Basic Sanitation (Superintendencia Sectorial de Saneamiento Básico, SSSB), replacing the superintendence of water. This Law changed the institutional framework for water regulation considerably and contained rules to ratify water contracts with a strong bias towards privatisation. This law also included rules that regulated the use and exploitation of water resources.[910]

Some of the conditions present in the concession contract with *Aguas del Tunari* and the recently adopted Law 2029 led to riots, demonstrating the population's social discontent. The only way to resolve this situation was to cancel the contract and to adopt new legislation on drinking water service and sewer systems. In 2000 Law 2066[911], which replaced Law 2029, was adopted and it is still in force today.

The antipathy that Bolivian citizens have for concession contracts for the provision of drinking water can be clearly seen in the Constitutional reform of 2009, which prohibits the privatisation of such services. A few months after the adoption of the Constitution, the Bolivian government decided to change the organisational structure of the executive branch. The superintendence that monitored and controlled the provision of water services was replaced with the Authority of Supervision and Social Control of Drinking Water and Sanitation (Autoridades de Fiscalización y Control Social de Agua Potable y Saneamiento Básico, AAPS),[912] which is now in charge of supervising, controlling and monitoring the activities of providers of drinking water and sanitation services. These changes comport with Law 2066, and Law 2878, the latter on the promotion of and support to the irrigation sector.[913]

The Constitutional reform of 2009 changed the legal order that existed in Bolivia, at least regarding water resources. It created the necessity to adapt the existing legislation to the new constitutional provisions. As a result, in July 2012 at the request of the President Evo Morales, the Ministry of Environment and Water presented a framework legislation proposal on water called 'water for life'.[914] It is expected that the law on

[909] Ley 2029 (adopted 22 October 1999, published 9 December 1999) Ley de Servicios de Agua Potable y Alcantarillado Sanitario.
[910] Rocio Bustamante, 'The Water War: Resistance against Privatisation of Water in Cochabamba, Bolivia' (2004) 1 (1) Revista de Gestión del Agua de América Latina 37.
[911] Ley 2066 (adopted 11 April 2000, published 17 April 2000) Ley de Prestación y Utilización de Servicios de Agua potable y Alcantarillado Sanitario.
[912] Decreto Supremo 0071 (adopted 9 April 2009, Published 14 April 2009) Crea las Autoridades del Estado Plurinacional en Extincion de las Superintendencias.
[913] Ley 2878 (adopted 8 October 2004, published 21 October 2004) Ley de Promoción y Apoyo al Sector Riego.
[914] Asamblea legislativa plurinacional de Bolivia, Ley Marco del Agua, presented on 30 April 2013 it is under revision in the Senate <http://www.senado.bo/upload/pdf/4300-p.l._senadores_201314.pdf> accessed 3 October 2013.

drinking water and sanitation services, Law 2066, will be amended[915] once the framework legislation on water is adopted, to conform to the Constitution.

5.2.4.1. Cochabamba and the water war

Cochabamba is one of the largest cities in Bolivia and the capital city of Cochabamba Department. The supply of drinking water service has been provided by the municipal company SEMAPA since 1967. However, by 1997 its performance was very poor, offering coverage to only 57 percent of the population. The Cochabambinos have suffered from water availability problems for a long time, particularly water rationing due to shortage of water resources, combined with large losses of water because of leakages. Hence, in many areas of the city water was only available for a few hours once or twice a week.[916]

Cochabamba Department experienced a demographic explosion in the last few decades, which was not matched by the provision of water services. This caused a number of conflicts in the area over the distribution of the water service to the population, the conflicts led to several short-term solutions, such as the drilling of wells, and a long-term solution which is the Misicuni project.[917] Owing to the lack of availability of water many consumers constructed their own water storage tanks and those who were not connected to the water network depended on their own wells or private vendors for their water supply.[918]

To increase the efficiency in the provision of drinking water service and to liberate public funds for investment in rural areas, the privatisation of SEMAPA-Misicuni was arranged in September 1999. The privatisation was carried out fulfilling an agreement with the World Bank, favouring *Aguas del Tunari*[919], but without observing national

[915] Asamblea legislativa plurinacional de Bolivia, Propuesta de ley: que promueve el acceso universal y equitativo a los servicios básicos de agua potable y energía eléctrica, presented on 5 April 2013, it is under revision by the Chamber of Deputies <http://www.senado.bo/upload/pdf/4310-p.l. diputados 201314.pdf> accessed 3 October 2013.

[916] Andrew Nickson and Claudia Vargas, 'The limitations of Water Regulation: The Failure of the Cochabamba Concession in Bolivia' (2002) 21 (1) Bulletin of Latin American Research 104-105.

[917] Rafael Marcos Ortíz Jiménez, 'La Gestión del Agua en Cochabamba, Bolivia. Una Historia Agitada' (2006) 34 El otro Derecho, ILSA, 166. The Misicuni Project attempts to supply water for the city, for agricultural activities and energy generation. According to the World Bank report (1999) it had an estimated cost of US$225 million for its four main components: a tunnel, water supply, electricity generation and water distribution. This project was linked to the Concession granted to the Consortium, under the premise that if Cochabamba wanted Misicuni, then it will have to pay for it following the principle of "full cost recovery". Rocio Bustamante, 'The Water War: Resistance against Privatisation of Water in Cochabamba, Bolivia' (2004) 1 (1) Revista de Gestión del Agua de América Latina 39.

[918] Andrew Nickson and Claudia Vargas, 'The limitations of Water Regulation: The Failure of the Cochabamba Concession in Bolivia' (2002) 21 (1) Bulletin of Latin American Research 105.

[919] Rocio Bustamante, 'The Water War: Resistance against Privatisation of Water in Cochabamba, Bolivia' (2004) 1 (1) Revista de Gestión del Agua de América Latina 39.

law. The concession was granted to the only company that participated in the bidding process, although in fact the legislation required at least three bidders.[920]

The concession contract authorised tariff increases of up to 35 percent, indexation of water tariffs to the US dollar, charging small farmers for using water for irrigation and obtaining a minimum profit of 15 to 16 percent for the utility company.[921] Furthermore, a new structure for water tariffs was agreed to, which was socially progressive in that it incorporated differential rates between low-income and high-income household users. The latter group had to pay more per cubic metre, and around twice what lower-income households paid per consumed cubic metre above 12 cubic metres.[922] In reality the new tariff structure led to high increases in the price for certain users, increasing up to 100 and 200 percent.[923]

The concession contract granted to the company exclusive rights for both the provision of drinking water and the ownership of water resources. Those exclusive rights affected users who had solved their water supply problem by constructing their own wells and storage tanks,[924] mainly because all wells were expropriated.[925] The legislation required a license to collect water in any form, and it was therefore understood that the rain was also privatised.[926] In other words, there was a restriction on the use of alternative systems for the provision of water services. This led to the confiscation of the infrastructure that citizens had built themselves to provide water, particularly in the peri-urban area of the city where households were not connected to the water system.[927]

These contractual conditions combined with the adoption of Law 2029, directly affected the entire population of Cochabamba, regardless of their socioeconomic status and gave rise to general social unrest. Consequently, between September and December 1999 there were social activist movements against privatising the provision of water services

[920] Rafael Marcos Ortíz Jiménez, 'La Gestión del Agua en Cochabamba, Bolivia: Una Historia Agitada' (2006) 34 El otro Derecho, ILSA, 167.
[921] Bronwen Morgan, *Water on Tap: Rights and Regulation in the Transnational Governance of Urban Water Services* (CUP, Cambridge 2011) 88.
[922] Andrew Nickson and Claudia Vargas, 'The limitations of Water Regulation: The Failure of the Cochabamba Concession in Bolivia' (2002) 21 (1) Bulletin of Latin American Research 108-109.
[923] In the literature there is no agreement on how high the water tariff increases were, some alleged they reached 100 percent, others 150 and up to 200 percent. See Andrew Nickson and Claudia Vargas, 'The limitations of Water Regulation: The Failure of the Cochabamba Concession in Bolivia' (2002) 21 (1) Bulletin of Latin American Research 101; Bronwen Morgan, *Water on Tap: Rights and Regulation in the Transnational Governance of Urban Water Services* (CUP, Cambridge 2011) 89; Rocio Bustamante, 'The Water War: Resistance against Privatisation of Water in Cochabamba, Bolivia' (2004) 1 (1) Revista de Gestión del Agua de América Latina 40.
[924] Andrew Nickson and Claudia Vargas, 'The limitations of Water Regulation: The Failure of the Cochabamba Concession in Bolivia' (2002) 21 (1) Bulletin of Latin American Research 113.
[925] Rafael Marcos Ortíz Jiménez, 'La Gestión del Agua en Cochabamba, Bolivia. Una Historia Agitada' (2006) 34 El otro Derecho, ILSA, 168.
[926] Oscar Olivera and Tim Lewis, *Cochabamba! Water War in Bolivia* (South End Press, Cambridge 2004) 9; Ley 2029 of 1999, Articulo 76.
[927] Rocio Bustamante, 'The Water War: Resistance against Privatisation of Water in Cochabamba, Bolivia' (2004) 1 (1) Revista de Gestión del Agua de América Latina 40;

and the rules dictated by Law 2029. This movement was first promoted mostly by irrigators' associations and other citizens. Afterwards, when the tariff rise was implemented in January 2000, the mobilised group grew, involving also women, students, professionals, farmers, coca leaf growers and urban consumers.[928] The organised coalition that headed the protest was known as *La Coordinadora Defensa del Agua y de la Vida* (Coalition in Defence of Water and Life). This social movement was composed of both rural and urban groups. Although both were claiming participation and control over water resources, the inhabitants of the urban area were more concerned about access and affordability issues, while people from the rural area were more involved with preservation of traditional rights, referred to as uses and customs (usos y costumbres).[929]

La Coordinadora had two primary objectives: the revision of the concession contract with *Aguas del Tunari* and the reform of Law 2029. Protests continued during the first months of 2000, and in March of the same year *La Coordinadora* organised a popular consultation where citizens voluntarily voted in favour of the cancellation of the concession contract and in opposition to the tariff increases and the privatisation allowed by Law 2029.[930] Activists continued protesting, and in April 2000 the government tried to end the water protest by imposing martial law. As a result, activists were arrested, people were killed and the media censored. The resulting violence forced the government to accede to the demands of the social movement led by *la Cordinadora.*[931] The government was forced to cancel the concession contract outright and to reform Law 2029.

As a result, the provision of water services was returned to SEMAPA, the previous public water operator, which had now an elected board including civil society members.[932] Law 2029 was derogated and replaced by Law 2066 on the provision of drinking water and sewer systems. This new legislation allows small cooperatives to provide drinking water services, recognises the right of indigenous peoples and peasants over their water resources and drinking water systems and guarantees social participation in the adoption of water tariffs.[933] After the water war, the Cochabambinos achieved that water tariffs could not rise by more than 10 percent. However, their

[928] Bronwen Morgan, *Water on Tap: Rights and Regulation in the Transnational Governance of Urban Water Services* (CUP, Cambridge 2011) 92.
[929] Bronwen Morgan, *Water on Tap: Rights and Regulation in the Transnational Governance of Urban Water Services* (CUP, Cambridge 2011) 90.
[930] Rocio Bustamante, 'The Water War: Resistance against Privatisation of Water in Cochabamba, Bolivia' (2004) 1 (1) Revista de Gestión del Agua de América Latina 42; Oscar Olivera and Tim Lewis, *Cochabamba! Water War in Bolivia* (South End Press, Cambridge 2004) 36.
[931] Bronwen Morgan, *Water on Tap: Rights and Regulation in the Transnational Governance of Urban Water Services* (CUP, Cambridge 2011) 89; Shiva Vandana, *Water Wars: Privatization, Pollution and Profit* (South End Press, Cambridge 2002) 103
[932] Bronwen Morgan, *Water on Tap: Rights and Regulation in the Transnational Governance of Urban Water Services* (CUP, Cambridge 2011) 89.
[933] Ley 2066, Artículos 34, 50 y 57.

situation concerning the lack of availability of water did not substantially change.[934] The water war was an iconic battle fought by the citizens of Cochabamba in order to protect their right to water, a right that is now explicitly recognised in their Constitution.

5.2.4.2. Recognition of the right to water

The Bolivian Constitution has gone through a number of reforms and amendments over the last 20 years; the most recent one was the reform of 2009. Previous Constitutional reforms brought considerable progress in the recognition and protection of human rights. With the reform of 1994, progress was reached in several areas. Firstly, the Constitutional Tribunal was established to safeguard and interpret the Constitution. This Tribunal only started to operate in 1999.[935] Secondly, following the same path taken by other Latin American countries a judicial mechanism for the protection of human rights and guarantees, known as *amparo* action, was incorporated in the Constitution and the law. Thirdly, it included in one of its provisions the clause of unenumerated rights,[936] which is an open clause for the recognition of human rights that are not explicitly acknowledged in the constitutional text.

By the end of the 1990's Bolivia was confronted with a strong crisis of governability and politics, which was clearly visible around the year 2000. In addition, after the first victory of social movements in the 'water war' in Cochabamba, social demands immediately rose to the point of claiming a restructuration of the state, through a constituent assembly.[937] The general demand of the population, particularly indigenous groups, for a new constitutional reform led the government to present an agenda for reforms. As a result, a new legislative act modifying the Constitution[938] was adopted on 1 August 2002 [939], which incorporates *habeas data*, sanctioning of any form of discrimination, equality between men and women, and interpreting fundamental rights according to the UDHR and international conventions on human rights.[940] This reform

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[934] Rafael Marcos Ortíz Jiménez, 'La Gestión del Agua en Cochabamba, Bolivia. Una Historia Agitada' (2006) 34 El otro Derecho, ILSA, 169.

[935] José Antonio Rivera S, 'La Jurisdicción Constitucional en Bolivia: Mutaciones y Reformas Constitucionales Recientes' (2009) 12 Revista Iberoamericana de Derecho Procesal Constitucional 192.

[936] The clause of unenumerated rights was incorporated in article 35 of the Constitution after the reform of 1994, nowadays that clause is found in article 13 of the actual Constitution.

[937] Pablo Regalsky, Las Paradojas del Proceso Constituyente Boliviano (Centro de Comunicación y Desarrollo Andino CENDA, Cochabamba 2009) 62 <http://www.cenda.org/publicaciones/regalsky-paradojas-proceso-constituyente_2010.html> accessed 4 March 2013.

[938] Hugo San Martín Arzabe, 'El Proceso de Reforma Constitucional en Bolivia' (2004) Anuario de Derecho Constitucional Latinoamericano 368 <http://www.juridicas.unam.mx/publica/librev/rev/dconstla/cont/2004.1/pr/pr18.pdf> accessed 4March 2013.

[939] Ley 2410 (adopted 8 August 2002) Ley de Necesidad de Reformas de la Constitución Política del Estado.

[940] Hugo San Martín Arzabe, 'El Proceso de Reforma Constitucional en Bolivia' (2004) Anuario de Derecho Constitucional Latinoamericano 367, 368, 371

also enlarged the catalogue of human rights listed in the constitution and comprised in one section all the rights and guarantees, which before were spread throughout the constitutional text.

In January 2009, the Bolivian Constitution was again reformed through a national referendum after a long, discordant process. The reform was prompted by intense mobilisations of social movements that were seeking to transform the structure of the state.[941] The Bolivian Constitution broadens even further the catalogue of recognised human rights, including individual and collective rights, although they are classified in a different way. Title II of the Constitution embraces fundamental rights and guarantees in five groups: 1) fundamental rights; 2) civil and political rights; 3) rights of the nations and indigenous peoples; 4) social and economic rights, which include the right to a healthy environment and the right to collective property; and 5) education, interculturality and cultural rights.

The Constitution of 2009 is a very innovative and progressive text. Firstly, it explicitly recognises a particular group of rights for indigenous peoples. Secondly, it also classifies some social and economic rights as fundamental rights, such as the right to health and the right to education, which normally place many positive obligations (economic expenditure) on the state. These rights are mentioned in two categories in the Constitution: as fundamental rights and as socioeconomic rights. Thirdly, and most importantly for this study, the Bolivian Constitution explicitly enshrines the right to water as an independent right and classifies it as a fundamental right.

The water war that took place in Cochabamba, as well as several indigenous mobilisations, played an important role in driving the constitutional reform process. This can be clearly seen through a number of provisions incorporated in the new Constitution related to water resources and the supply of drinking water. Article 16 of the Constitution declares that '*Every person has the right to water and food'* and Article 20 provides that *'Every person has the right to universal and equitative access to the basic services of drinking water…'* Article 20 of the Constitution recognises basic services as a fundamental right. This provision states that every person has the right to universal and equitable access to basic services, such as drinking water and sewer systems. It is the responsibility of the state, at all levels of government, to provide basic services through public companies, community or cooperative companies and mixed enterprises. The provision of the service should respond to the criteria of universality, responsibility, accessibility, continuity, quality, efficiency, equitable fees and necessary coverage, with social participation and control. Moreover, article 20 explicitly establishes that access to water and sewer systems are human rights, and they are not

<http://www.juridicas.unam.mx/publica/librev/rev/dconstla/cont/2004.1/pr/pr18.pdf> accessed 4March 2013.

[941] Franco Gamboa Rocabado, 'Transformaciones Constitucionales en Bolivia, Estado Indígena y Conflictos Regionales' (2010) 71 Colombia International 153 <http://colombiainternacional.uniandes.edu.co/view.php/499/index.php?id=499> accessed 5 March 2013.

subject to concession or privatisation. The Constitution prohibits the privatisation of water services and establishes that state enterprises must manage basic services, including drinking water and sewer systems, directly or by means of public, community, cooperative or mixed enterprises.

Concerning water resources article 373 of the Constitution reaffirms the fundamental character of water. It stipulates that the state shall promote the use and access to water on the basis of the principles of solidarity, reciprocity, equity, diversity and sustainability. Water resources cannot be subject to private appropriation, and neither water resources nor water services can be given in concession.[942] Article 374 of the Constitution establishes that the state will protect and guarantee the priority use of water for life, and that the state has the duty to manage, regulate, protect and plan the adequate and sustainable use of water resources, with social participation, while guaranteeing all inhabitants access to water.

The Constitution is very clear and consistent throughout its text regarding the fundamental character given to water and the way in which water services are to be provided. The Constitution recognises and respects the uses and customs of indigenous communities, their local authorities and their rights over the management and sustainable administration of water.[943]

5.2.4.3. Mechanisms to protect the right to water

The Bolivian Constitution, in its article 109, declares that all rights recognised therein are directly applicable and enjoy the same guarantees for their protection. The Constitution incorporates different judicial mechanisms for their protection: the habeas corpus (acción de libertad), habeas data (acción de protección de privacidad) and *amparo* action.[944] The latter is regulated in Law 027 on the Plurinational Constitutional Tribunal.[945] Since the judicial action that is relevant for our study is the *amparo* action, we will only focus on this one.

Article 128 of the Constitution states that the *amparo* action can be initiated when any illegal or unjustified action or omission by a public authority, private individual or collective entity restricts, suppresses or threatens the rights recognised in the Constitution and the law. This action can only be filed when there are no other means or legal recourse available for the immediate protection of the restricted, suspended or threatened right.[946] Unlike the actions for the protection of human rights established in Chile and Colombia, the *amparo* action in Bolivia protects all rights and guarantees

[942] Bolivian Constitution, Article 373.
[943] Bolivian Constitution, Article 374 (II).
[944] Bolivian Constitution, Articles 125 to 131.
[945] Ley 027 (adopted 6 July 2010) Ley del Tribunal Constitucional Plurinacional.
[946] Bolivian Constitution, Article 129.

embedded in the Constitution and the law, unless the allegedly violated rights can be protected by other special judicial actions such as habeas corpus, habeas data or popular action.[947] Similar to the *recurso de protección* in Chile, the Bolivian Constitution establishes a maximum term to initiate this action. However, the time given for the *amparo* action is much longer than in Chile: it is six months as of the commission of the alleged violation or the notification of the last administrative or judicial decision.[948] According to article 129 of the Constitution and article 64 of the Law on the Plurinational Constitutional Tribunal all judicial decisions taken based on *amparo* action must automatically be sent to the Constitutional Tribunal for revision.[949] This mechanism guarantees the uniformity of the constitutional interpretation made by the Tribunal.[950]

The *amparo* action has been used effectively to protect the human right to water, even before this right was explicitly included in the Constitution. The Constitutional Tribunal stated that water is a vital resource upon which the exercise of other fundamental rights depends, such as the rights to life and health, which form part of the human rights explicitly recognised in international instruments. The Tribunal indicated that although the right to water has gained considerable attention, particularly after the acknowledgment of the CESCR in its General Comment 15, the Bolivian Constitution did not make any reference to it. Before the adoption of the Constitution of 2009, the protection of this right was feasible through the constitutional block.[951] The Constitutional block means that international treaties on human rights have gained constitutional rank, and therefore, the rights embraced therein are also subject to protection.[952] In several judgments between 2001 and 2008, the Constitutional Tribunal granted the protection of access to water as a right derived from the right to life, the right to health, the right to security and the right to a dignified life. In several judgments the Tribunal ruled that individuals who are not authorised by law to suspend the provision of drinking water and do so, for instance to force tenants to pay their rent when they are in arrears, are committing an unlawful act and therefore are violating the right to life and health.[953]

[947] Ley 027, Artículo 74.
[948] Bolivian Constitution, Article 129.
[949] Bolivian Constitution, Article 129 (IV); Ley 027, Artículo 64.
[950] Allan R. Brewer-Carías, *Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceedings* (CUP, Cambridge 2009) 109.
[951] Bolivian Constitutional Tribunal, constitutional decision 0156/2010-R, Judge Rapporteur: Ernesto Félix Mur, 17 May 2010.
[952] The doctrine of the Constitutional block was first mentioned in the jurisprudence of the Constitutional Tribunal. Nowadays, it can be found in article 410 of the Constitution.
[953] Bolivian Constitutional Tribunal, constitutional decision 0953/2006-R, Judge Rapporteur: Silvia Salame Farjat, 2 October 2006; Bolivian Constitutional Tribunal, constitutional decision 659/2002-R, Judge Rapporteur: René Baldivieso Guzmán, 7 June 2002; Bolivian Constitutional Tribunal, constitutional decision 980/2001-R, Judge Rapporteur: José Antonio Rivera Santivañez, 14 September 2001. All the judicial decisions of the Constitutional Tribunal can be consulted in the official website of

After the new Constitution of 2009, the jurisprudence of the Constitutional Tribunal made an adjustment. It continues to protect the right to water, although no longer as a derivative right, but rather as an independent right. In the judgement 0559 of 2010, the Constitutional Tribunal declares that article 16.I of the Constitution recognises and establishes the right to water as a fundamental right. The Constitution strengthens this right in article 20.I, by providing that every person has the right to universal and equal access to the basic services of water. The Tribunal further declares, based on certain constitutional provisions (article 16.I, 20.I, 373.I and 374), that the Constitution imposes positive obligations on the state that must be fulfilled to ensure universal and equal access to basic drinking water services, since this right is a fundamental right. In addition, article 374 of the Constitution recognises the right to water as a fundamental element for life. This provision indicates that the state has the duty to protect and ensure the priority use of water for life.[954] In other judgements, adopted in 2012, the Constitutional Tribunal declares that the fundamental right to water is an independent right. Therefore, it can be safeguarded independently from other rights.[955]

The Constitutional Tribunal has defined, in various judgments, the content of the right to water. In decision 1106/2010-R of 2010 the Tribunal stated that the human right to water is a right inherent to every human being. Further, water is not a commodity; it cannot be privatised or subjected to commercial management. Rather, water should be made accessible to everyone, in sufficient quantities and in conditions that are suitable for consumption. The source of the water supply should be located or directly in the home or as close to home as possible. Water services should be safe from interruption or arbitrary or unjustified disconnection. Water is an absolutely necessary element to the right to live in dignity.[956] In decision 0559/2010-R of 2010, the Constitutional Tribunal adopts the definition given by the CESCR in its General Comment 15 and describes the human right to water as the right to 'sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related diseases and to provide for consumption, cooking, personal and domestic hygienic requirements'.[957]

The Constitutional Tribunal uses the typology of human rights of obligations to set the state's obligations to guarantee the right to water. The Tribunal declares that the state

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the Tribunal http://www.tribunalconstitucional.gob.bo (new website http://www.tcpbolivia.bo/tcp/index.php).

[954] Bolivian Constitutional Tribunal, constitutional decision 0559/2010-R, Judge Rapporteur: Abigael Burgoa Ordóñez, 12 July 2010, para III.3; Bolivian Constitutional Tribunal, constitutional decision 0084/2012, Judge Rapporteur: Mirtha Camacho Quiroga, 16 April 2012, para III.1.

[955] Bolivian Constitutional Tribunal, constitutional decision 052/2012-R, Judge Rapporteur: Neldy Virginia Andrade Martinez, 5 April 2012, para III.6

[956] Bolivian Constitutional Tribunal, constitutional decision 1106/2010-R, Judge Rapporteur: Juan Lanchipa Ponce, 27 August 2010, para III.3.1.

[957] Bolivian Constitutional Tribunal, constitutional decision 0559/2010-R, Judge Rapporteur: Abigael Burgoa Ordóñez, 12 July 2010,para III.3.

has the following obligations: a) to respect the right to water by not interfering with the enjoyment of the right, either by interrupting water connections, raising its price or polluting water resources to the detriment of health; b) to protect and conserve water sources and natural water flows by avoiding their contamination or alteration, and by enacting rules that regulate their use and extraction; c) to fulfil the right to water by, adopting the necessary measures to ensure implementation of the right, including economic policies on market, subsidies, supply and infrastructure.[958]

Last but not least, the Tribunal declares that the right to water is both an individual and a communal right. A group of people should not be allowed to exercise this right to the detriment of an individual, nor should an individual be allowed to exercise this right to the detriment of a group. The Tribunal explains that this is why the right to water is embedded in both the catalogue of fundamental rights for individuals, and the catalogue of the rights of nations and indigenous people.[959] Thus, the human right to water of both individuals and collective groups are recognised at the same level, and one cannot be considered higher than the other.

5.3. Implementation of the right to water at domestic level

For an effective realisation of human rights their recognition in the domestic legal system is important; however, their implementation is decisive. With the purpose of exploring if and how implementation of the human right to water is achieved, legal measures and judicial decisions of the four countries under study (Argentina, Bolivia, Chile and Colombia) will be analysed. Jurisprudence is used to expand and clarify the meaning and content of the right, as well as to illustrate the factual implementation in each country.

The CESCR stablishes in General Comment 15 the main elements that compose the human right to water: availability, quality and accessibility. These elements are relevant in all circumstances and are expected to be shaped and fleshed out by each state. For instance, each country should determine the minimum amount of water to satisfy personal and domestic uses (availability), water quality standards and the mechanisms to guarantee affordable water for all. In order to assess an effective implementation of the human right to water at the domestic level, these elements are the focus of this section.

[958] Bolivian Constitutional Tribunal, constitutional decision 0156/2010-R, Judge Rapporteur: Ernesto Félix Mur, 17 May 2010, para III.2; Bolivian Constitutional Tribunal, constitutional decision 0478/2010-R, Judge Rapporteur: Ernesto Félix Mur, 5 July 2010, para III.3.
[959] Bolivian Constitutional Tribunal, constitutional decision 0156/2010-R, Judge Rapporteur: Ernesto Félix Mur, 17 May 2010, para III.4.

5.3.1. Contentious cases in domestic courts

The four South American states under study recognise the human right to water. Bolivia and Colombia each acknowledges such right as an independent right respectively through its Constitution and its jurisprudence. Argentina on the other hand, acknowledges this right because of its incorporation in different international human rights treaties ratified by the state and considers it as an extension of other rights. In Chile, this right is not generally recognised, and if so, it is also treated as a derivative right. In this section issues concerning physical access, affordability, quality, disconnection and the determination of minimum quantities of water (availability) will be examined, in order to observe how the right to water is being implemented at the national level. Regarding water quality, although each state adopts its own national standards it is not possible to compare those standards meaningfully, since their adoption depends on socio-economic and environmental conditions which vary from country to country.

5.3.1.1. Argentina

Argentina is a federal state that has delegated the responsibility for the provision of drinking water to the provinces. Argentina's recognition of the human right to water (as a derivative right) has taken place through the jurisprudence of the provincial courts. It is thus likely that the implementation of this right will vary from province to province. This study focuses on the implementation mechanisms adopted in the Province of Buenos Aires, the Province of Cordoba and the autonomous city of Buenos Aires.

5.3.1.1.1. Access to water

In 2011, 95 percent of the population in rural areas gained access to improved drinking water sources, while the proportion of the population with access to improved drinking water sources in urban areas reached 100 percent.[960]

In the Argentine jurisprudence, we found two cases dealing with access to drinking water: one against the Province of Cordoba and another against the Autonomous city of Buenos Aires. In both cases groups of citizens did not have access to a public drinking water system in the area where they live.

[960] --'Progress on Sanitation and Drinking-Water 2013 Update', (World Health Organization and UNICEF 2013) 15 <http://www.wssinfo.org/fileadmin/user_upload/resources/JMPreport2013.pdf> accessed 3 October 2013.

In the first case a group of citizens assisted by an NGO initiated an *amparo* action[961] against the municipality and the Province of Cordoba; citizens claimed the municipality had denied their right to water. The applicants were living in a community known as 'Chacras de la Merced' which is not connected to the public water distribution network. The community obtained its drinking water from wells filled by the river Suquia. The applicants alleged that these wells are heavily polluted with faecal matter and other contaminants, and that this pollution is caused by a sewage treatment plant that was built upstream on the river, close to the neighbourhoods of the applicants. The applicants alleged that the capacity of the treatment plant was not sufficient to deal with all the new connections authorised by the municipality. As a result, there was spillage of untreated sewage into the river Suquia, damaging the environment and impairing the health of the people living in Chacras de la Merced. The applicants were forced to use the contaminated water from the wells to satisfy all their basic needs, such as drinking, cooking, washing of clothes and personal hygiene. The applicants claimed the protection of the right to health, a healthy environment and a dignified life. The applicants requested that the Province and municipality of Cordoba connect them to a distribution network of drinking water so their right to health, right to water, and right to a dignified life can be restored. In this case the judge found that the applicants have proven that the water wells were contaminated with high levels of nitrates and faecal coliform, making this water unsuitable for human consumption. The judgement made specific reference to article 25 of the UDHR on the right to an adequate standard of living, which has constitutional hierarchy according to article 75 of the National Constitution, and articles 11 and 12 of the ICESCR, as well as national laws. The judgment specifically refers to General Comment 15 and notes that this document explicitly states that '[t]he human right to water is indispensable for leading a life in human dignity [and] it is a prerequisite for the realisation of other human rights'. The judgement also points out that the right to health requires taking measures, such as providing drinking water, to prevent damage to human health. Access to drinking water constitutes an implicit element of the right to health. The judgement concludes that the municipality of Cordoba must take the necessary interim measures to minimise the environmental impact of the treatment plant until a final solution regarding its operation is made. The province of Cordoba was ordered to provide the applicants with 200 litres of water per household per day until full access to the water distribution network was ensured.[962] In this way the right to water was protected.

[961] *Marchisio, Jose Bautista and others v Executive power of the municipality of Cordoba and the executive power of the Province of Cordoba*, amparo action, file No. 500003/36. First instance 8 judge in civil and comercial matters, Córdoba, 14 October 2005.

[962] *Marchisio, Jose Bautista and others v Executive power of the municipality of Cordoba and the executive power of the Province of Cordoba*, amparo action, file No. 500003/36. First instance 8 judge in civil and comercial matters, Córdoba, 14 October 2005.

In the second *amparo* action[963] a group of citizens in the city of Buenos Aires, claimed the municipality had denied their right to water. They initiated an action against the government of the Autonomous city of Buenos Aires, because their community did not have any access to a public water system. The plaintiffs had urged the government to take action to provide them access to the public water system. The plaintiffs also alleged that the municipality had initially provided the community with water from small water trucks as an emergency measure, but that supply had stopped in June 2007, which aggravated the situation.

In granting the plaintiffs' petition, the Court declared that all rights related to the protection of life, dignity and health are violated if the right to water is not respected. According to the Court, the right to life can be split into four elements: 1) the right to adequate food; 2) the right to access to drinking water; 3) the right to housing; and 4) the right to health. The Court also stated that while most social rights are achieved progressively, that is not the case with the right to water, because this right is indispensable for the subsistence of human beings. As a result, access to drinking water must be guaranteed, in quantities sufficient to sustain human life. The Court asserted that article 75 of the National Constitution gives constitutional rank to international treaties on human rights, including the ICESCR. Moreover, the ICESCR must be interpreted according to the General Comments of the CESCR, which considers the right to water to be intrinsically connected with the right to health. The Court also stated that provision of a drinking water supply is a duty of the public authorities that requests minimum implementation. Consequently, the Court granted the *amparo* action requesting the defendant to guarantee the provision of drinking water to the inhabitants of the affected community until an alternative solution was found. Furthermore, the Court ordered that every day, including Sundays, from 08:00 to 22:00 hours water must be provided by three trucks. The Court specifically referred to Sundays because during the judicial proceeding it was revealed that sometimes the plaintiffs did not receive any water on that day.[964]

In both cases, access to safe drinking water was granted and the provision of drinking water was ordered. And in both cases, the court ruled that it is the responsibility of the state (national and local authorities) to take the necessary measures to guarantee the human rights to water to its citizens.

5.3.1.1.2. Availability and disconnection of water services

[963] *Asociación Civil por la Igualdad y la Justicia v GCBA*, amparo action, file No. 20898/0, Court of Appeals in Administrative and Tax of the City of Buenos Aires -Sala 1., 18 July 2007 <http://www.derechoshumanos.unlp.edu.ar/assets/files/documentos/asociacion-civil-por-la-igualdad-y-la-justicia-c-ciudad-de-buenos-aires-derechos-a-la-vida-y-a-la-salud.pdf> accessed 5 February 2013.

[964] *Asociación Civil por la Igualdad y la Justicia v GCBA*, amparo action, file No. 20898/0, Court of Appeals in Administrative and Tax of the City of Buenos Aires -Sala 1., 18 July 2007.

In Argentina the situation concerning the disconnection of drinking water services varies from province to province. In some provinces utility companies are not allowed to completely discontinue drinking water service for residential users due to lack of payment and must guarantee the supply of a minimum amount of this vital resource. Some of the provinces that do not allow a complete suspension of drinking water due to lack of payment are: the Province of Buenos Aires, the Province of Cordoba, the Province of Catamarca[965], the Province of Mendoza[966] and the Autonomous city of Buenos Aires. However, this is not the general rule. There are other provinces that authorise utility companies to completely stop supplying drinking water when residential users are in arrears. This is the case of the Province of Chaco[967], the Province of Tucuman[968] and the Province of Rio Negro[969].

This situation creates disparity in the protection of the human right to water. To avoid such inconsistencies two different solutions can be adopted. The first option is to allow the complete suspension of the service, but at the same time provide adequate mechanisms to the most vulnerable (poor or marginalised) people so they receive at least a minimum amount of water. Another option is to adopt federal legislation prohibiting water providers from cutting off the supply of drinking water completely, and establishing a minimum amount of drinking water that is sufficient to satisfy the basic needs of all members of a family in case they do not have the economic capacity to pay for this vital service. There have been some federal law proposals to recognise the right to water as a human right and to prohibit the suspension of the supply of drinking water for residential users in the entire Argentine territory. The most recent proposal was presented in March 2008.[970] However, none of the proposals have been approved.

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[965] The legal regime of the Province of Catamarca only allows the utility companies to partially reduce the supply of drinking water for residential users when they are in arrears of more than three periods. Ley 4963 Marco Regulatorio de Agua Potable y Desagües Cloacales de la Provincia de Catamarca, Artículos 12 (c) y 39, <http://www.enre-catamarca.gov.ar/?page_id=518> accessed 8 February 2013.

[966] The supply of drinking water can be temporarily restricted for residential users when they are in arrears of two or more bills, except for users that are receiving subsidies for the payment of drinking water, which are retired people and residential users with low economic resources. Ley 6.044 de 1993, Ley de Reordenamiento Institucional del Sector Agua Potable y Saneamiento, Artículos 20 y 26, <http://www.epas.mendoza.gov.ar/images/stories/pdf/Ley_Prov._6044.pdf> accessed 8 February 2013.

[967] Law 2867 of 1983, article 5, gives the faculty to the utility company to suspend the supply of drinking water when a user is three months in arrears of his or her water bills.

[968] The legal regime of this province allows the utility companies to cut off the service of drinking water to a user that is in arrears of three or more bills. Decreto 1.091/3 (MDP) (adopted 16 April 2004), Reglamenta el Artículo 77 de la Ley 6529, que autoriza el corte del servicio de los usuarios, Anexo para 3, <http://rig.tucuman.gov.ar/leyes/scan/scan/D-1091-3-MDP-16042004.pdf> accessed 8 February 2013.

[969] Ley 3183, aprobó el marco regulatorio para la provisión de agua potable y de desagües cloacales, Artículo 43, <http://www.legisrn.gov.ar/L/L03183.html> accessed 5 February 2013.

[970] Honorable Cámara de Diputados de la Nación, Proyecto de ley publicado en Trámite Parlamentario N. 11, on 17 March 2008 <http://www1.hcdn.gov.ar/proyxml/expediente.asp?fundamentos=si&numexp=0738-D-2008> accessed 5 February 2013.

Following, two cases are examined concerning disconnection, one in the province of Cordoba and another in the Province of Buenos Aires. The first case deals with the issues of disconnection and the guarantee of a minimum amount of water. A group of indigent families initiated an *amparo* action against the water provider of the city of Cordoba (Aguas Cordobesas) for suspending the service of drinking water due to failure to pay the respective water bills, attributable to their indigent situation.[971] The applicants claimed that the 50 litres of water per family per day that the utility company[972] was supplying after the suspension of the service, was not enough to meet the basic needs of the affected families. The applicants requested to be provided with at least 200 litres of drinking water per family per day. This amount had been required in the regulatory regime for the cooperative when it had been providing the drinking water service (Decree 4560 –Series 'C').[973] In this case the court stated that a minimum of drinking water must be guaranteed, since the supply of water is a public service. Thus, the province of Cordoba is the responsible for the provision of public services whether directly or indirectly, e.g. through concessions. The court also declared that failure to provide public services with the appropriate quality and quantity at a low cost, taking into account the needs of the poor, will be considered a state violation of certain rules, including article 42 of the Federal Constitution, which expressly requires the authorities to ensure adequate public services. The court also noted that according to article 8 (c) of the provincial Law 8.835, the Citizens Charter, every person has the right to receive direct assistance when found in an extreme situation that does not allow him or her to meet his or her own basic needs or when he or she is in a social emergency due to natural disasters. The court concluded that the provision of 50 litres of water per household, established in the regulatory framework in the case of suspension of the service, is insufficient to guarantee the minimum basic conditions of health and hygiene to a family. Thus, the court ruled that the drinking water provider must guarantee a minimum of 200 litres per family per day, and the court explicitly said that the provider could reach an agreement with the state authorities to be compensated for the costs.[974] In this case the court was clearly protecting the right to water by guaranteeing sufficient

[971] *Quevedo Miguel Angel, Marquez Ramón Hector, Boursiac Ana María, Pedernera Luis Oscar and others v Aguas Cordobesas S.A.* amparo action deputy judge of first instance, and 51 judge in cicil and comercial matters, Córdoba, 8 Aprihhhhjjl 2002.

[972] In the city of Cordoba, the capital of this province, the supply of drinking water to the whole municipality is provided by a private company *(Aguas Cordobesas)*, thanks to a concession contract that grants to this company the exclusive right to provide this public service for the period of thirty year (1997-2027). Nevertheless, in other municipalities of the province of Cordoba the household utility of water and sanitation are provided in many cases by different cooperative of users.

[973] Decreto 4560 – Serie "C" de 1995 (adopted 15 June 1995) Reglamentación de Servicios Sanitarios por Particulares. The agreements reached with the various water providers in the province of Cordoba (cooperatives, concesionaires, among others) may largely differ. Some of the difference can be seen in water tariffs or the minimum amount of water that they need to provide in case the service is suspended due to lack of payment.

[974] *Quevedo Miguel Angel, Marquez Ramón Hector, Boursiac Ana María, Pedernera Luis Oscar and others v Aguas Cordobesas S.A.* amparo action deputy judge of first instance, and 51 judge in cicil and comercial matters, Córdoba, 8 April 2002.

amounts of water to satisfy the basic needs of a whole family, protecting also in this way their right to health. The court referred to the obligations a state has concerning its duty to protect and fulfil, since the state is not providing the service directly but through a non-state party, and the utility company must provide a certain amount of water to those who cannot afford it and then claim the payment for this service from the state.

The second case concerns the Province of Buenos Aires. The regulatory framework on the supply of drinking water adopted by Decree 878 of 2003 added a new important provision prohibiting the complete suspension of the supply of drinking water. This was a reversal of the preceding provincial Law 11.820 that allowed the water provider, which was a concessionaire, to discontinue the service of drinking water when the user was at least six months in arrears of paying his or her bills.[975] In fact, before the new regulatory framework was adopted (Decree 878), the law that authorised the concessionaire to stop supplying drinking water in case of non-payment for the service was declared unconstitutional. An association for the protection of users and consumers initiated an *amparo* action[976] to request the unconstitutionality of the relevant provision of Law 11.820. In this case the court concluded that access to drinking water is a right that must be guaranteed to all inhabitants of the country, regardless of their economic capacity to pay for the service. The court also explained that it is difficult to imagine a situation where the health of individuals is not put at risk due to a complete suspension in the supply of drinking water. The court stated that suspending drinking water service affects the constitutional rights to life and health, and additionally, violates the state's obligations embedded in international treaties, which have constitutional rank. This judgment declared article 34 Annex II of Law 11.820 unconstitutional, since it allowed suspension of drinking water service for residential users (this does not apply to commercial or industrial users), thus violating constitutional rights (users' and consumers' rights), as well as rights enshrined in conventions with constitutional rank, such as the UDHR (art. 25), the American Declaration of the Rights and Duties of Man (art. XI), the ICESCR (art. 11) and the Convention on the Rights of the Child (art. 2, inc 2, c).[977]

A year after this judgment was reached, Decree 878 of 2003 was adopted, which establishes that the provider of drinking water services is not allowed to completely stop supplying the services for residential users due to lack of payment, since the provider must guarantee the provision of a minimum vital amount of water.[978] Nevertheless, this

[975] Ley 11820, Anexo II, Artículo 34 II Corte del servicio.
[976] *Usuarios y Consumidores en Defensa de sus Derechos, Asociación Civil v Aguas del Gran Buenos Aires S.A.*, amparo action, file No. 44.453 of 2002, Judge of peace, of Moreno in Buenos Aires, 2 October 2002.
[977] *Usuarios y Consumidores en Defensa de sus Derechos, Asociación Civil v Aguas del Gran Buenos Aires S.A.*, amparo action, file No. 44.453 of 2002, Judge of peace, of Moreno in Buenos Aires, 2 October 2002.
[978] Decreto 878 de 2003, Artículo 61 (b) and (c).

Decree does not establish the quantity of water that should be considered as minimum vital amount.

Neither the provinces of Buenos Aires and Cordoba nor the Autonomous city of Buenos Aires allow a complete suspension of drinking water supply for residential users (homes), since a minimum amount of water should continue to be provided in case the user cannot afford to pay. For the city of Cordoba the Users Rules[979] of the utility company (Aguas Cordobesas) provide that when a residential user is in arrears by a minimum of three months, the utility company can partially suspend the supply of drinking water, but it must continue providing at least 50 litres per day. Similarly, according to law 26.221 of 2007[980] on the regulatory framework of drinking water services in the Autonomous city of Buenos Aires, supply of drinking water can only be restricted in case a residential user is in arrears with his or her water bill. This means that although the user is in arrears and not entitled to the service, the residential user will still receive a certain amount of water.[981] In response to an enquiry made to the utility provider in Buenos Aires, the company indicated that the amount provided in case of restriction is 100 litres per person per day.[982]

We can conclude that the implementation of the human right to water, particularly the minimum amount of water that is necessary to satisfy basic human needs, and disconnection due to lack of payment, varies greatly from province to province.

5.3.1.1.3. Economic access

Economic access refers to the affordability of drinking water supply. This means that direct and indirect costs and charges must be affordable for all without discrimination. Even the poor should have access to drinking water. In general in Argentina, all provinces created a tariff regime that regulates the price of water services, depending on whether the supply can be measured or not. Since some properties still do not have installed meters to calculate the exact water consumption, the price of the drinking water service is determined by the size of the land where the property is located, the actual size of the house and the material of which it is constructed.

[979] Aguas Cordobesas, 'Reglamento de Usuarios', Artículo 67 (e) <http://www.aguascordobesas.com.ar/Media/Default/InfoUtilDescargas/Reglamento_de_Usuarios.pdf> accessed 3 January 2013.
[980] Ley 26.221 de 2007 (adopted 13 February 2007, published on 28 February 2007).
[981] Ley 26.221 de 2007. Artículo 81.
[982] Ente Regulador de Agua y Saneamiento, Ref. Consulta No. 25.372, adopted in Buenos Aires on 21 March 2013.

A) Province of Cordoba

The concession contract concluded in 1997 between the province of Cordoba and the concessionaire (Aguas Cordobesas) for the supply of drinking water in the city of Cordoba was renegotiated in 2005. The new agreement was enacted by Law 9.279.[983] In this renegotiated contract the province clearly declares its intention to implement a social tariff for users with limited or no economic capacity. In this way low-income users can afford to pay the cost of drinking water that is vital for their survival. In addition, the province recognises that a minimum amount of water should be free and a progressive rate per cubic metre should be applied to avoid waste of water. As a result, a new tariff regime was agreed, as enshrined in Annex III of Law 9.279 of 2005. This new tariff regime grants subsidies and exemptions to specific users up to a limited amount within the boundaries of a rational use of drinking water. Some of the beneficiaries that receive exemptions or payment discounts for water utilities are: temples, with an exemption of up to 100 cubic metres per month[984]; public schools that are 100 percent subsidised by the state and provide their service for free; institutions that are offering shelter are exempted up to 4.5 cubic metres per month and per bed; public hospitals that are providing free service are exempted up to 9 cubic metres per month per bed; retired people with a low income that fulfil the requirements established in the tariff regime are exempted up to 50 percent of the total of their bills.

Additionally, in 2006 the programme 'supportive tariff' was created by Decree 1.357.[985] The main objective of this programme is to reduce the expense of utility tariffs and property taxes for families who live under the poverty line. This objective is achieved by creating a social tariff for household utilities and by exempting or partially exempting certain owners from property taxes.[986] This social tariff is applicable to two types of beneficiaries: poor and indigent families. This classification is made based on their income and on certain rules established by the National Statistics and Census Institute. Under these rules, indigent families have a lower income than poor families. According to article 5 of Decree 1.357, poor families that are beneficiaries of the social tariff receive a reduction of 50 percent in the tariff up to a limit of 25 cubic metres per month. Indigent families are exempted from the payment of the tariff up to 25 cubic metres per month. In both cases if the beneficiary exceeds the specified amount of water, the normal tariff will apply for the excess water that is used.[987] In order to be part of this programme the head of each family needs to fill out an application form, with a

[983] Ley 9279 de 2005 (adopted on 28 December 2005, published on 29 December 2005), Aprueba Proyecto de Acuerdo de Renegociación del Contrato de Concesión del Servicio Público de Suministro de Agua Potable de la Ciudad de Córdoba.
[984] Ley 9279 de 2005, Anexo III, Artículo 27 y 29.
[985] Decreto 1357 de 2006 (adopted on 18 October 2006 and published 4 May 2007), crease el programa 'tarifa Solidaria' <http://web2.cba.gov.ar/web/leyes.nsf/85a69a561f9ea43d03257234006a8594/24ff59dab124b7e78325758600605b67?OpenDocument> accessed 2 February 2013.
[986] Decreto 1357 de 2006, Artículo 2.
[987] Decreto 1357 de 2006, Artículo 5.

declaration of his or her family's economic situation, so the province can verify that information and include the family in the programme. Article 13 of Decree 1.357 provides that the Ministry of Social Development is in charge of the application of the programme and it can include new beneficiaries. Consequently, in 2011 the Ministry of Social Development decided to incorporate new families under specific circumstances. As a result, two Resolutions were issued. Resolution 104[988] includes households that are economically unable to pay the bills for basic services such as water and electricity, and who have a family member with a disability of greater than 50 percent.[989] Resolution 103[990] includes families composed of elderly retired people who only have one property, where they live and from where they derive their only income (this income cannot be greater than a maximum amount established by law), thus experiencing inability to pay the basic services of water and electricity.[991] To remain eligible for this programme, a beneficiary family must continue to fulfil certain requirements. If the economic conditions of a family change favourably and it consequently no longer qualifies as a poor or indigent family, the household will no longer be eligible for the programme. According to government information, 98.486 families were beneficiaries of the programme in October 2012.[992]

B) Autonomous city of Buenos Aires

Law 26.221 of 2007 on the supply of drinking water in the city of Buenos Aires also includes some exemptions and subsidies for users of this service. There are two types of subsidies: specific and non-specific. The specific subsidy is granted directly to users with low-income. The non-specific subsidy charges lower prices to those users with fewer economic resources, and it is funded by charging higher prices to users with more economic resources.[993]

Law 26.221 required the establishment of a social tariff that offers a mechanism to identify priority cases. The social tariff is granted for 12 months to each identified priority user and can be renewed according to the rules that the authority in charge

[988] Resolución 104 de 2011 (adopted 23 March 2011, published 12 April 2011), Programa Tarifa Solidaria incorpora nuevos beneficiarios.
[989] Resolución 104 de 2011, Artículo 1.
[990] Resolución 103 de 2011 (adopted 23 March 2011, published 12 April 2011), Programa Tarifa Solidaria incorpora nuevos beneficiarios.
[991] Resolución 103 de 2011, Artículo 1.
[992] Redacción Prensa del Gobierno de la Provincia de Córdoba, 'tarifa Solidaria: 6.050 altas y 903 bajas en Nuevo cruce de datos' <http://prensa.cba.gov.ar/informacion-general/tarifa-solidaria-6-050-altas-y-903-bajas-en-un-nuevo-cruce-de-datos/> accessed 5 February 2013.
[993] Ley 26.221 de 2007 (adopted 13 February 2007, published 28 February 2007) Apruébese el Convenio Tripartito Suscrito el 12 de Octubre de 2006 entre el Ministerio de Planificación Federal, Inversión Pública y Servicios, la Provincia de Buenos Aires y el Gobierno de la Ciudad Autónoma de Buenos Aires. Prestación del Servicio de Provisión de Agua Potable, y Colección de Desagües Cloacales. Sociedad Agua y Saneamientos S.A. Disolución del E.T.O.S.S. Creación del Ente Regulador de Agua y Saneamiento y de la Agencia de Planificación. Marco Regulatorio, Annex 2, Article 64.

creates.[994] A social tariff programme was created and has been in force since 2002. It was created mainly due to the socioeconomic crisis that existed at that time. The main objective of the programme is to assist families in a vulnerable situation (unemployment, low-income) to pay for the services of drinking water and sanitation by granting them a subsidy.[995] The programme was set up between the government and the private company that was providing the service of drinking water at that time, as a strategy to improve the payment of users in arrears, primarily in low-income population.[996] There are a number of special circumstances under which certain families could be included in the social tariff programme: a) persons having an income below the poverty line; b) children under the age of 14; c) persons over the age of 70; d) pregnant women; e) disabled persons; f) persons with serious or chronic diseases and costly treatment; g) victims of disasters and catastrophes; h) single parents.[997] The households that fall under these circumstances are known as 'social case'. Since there is a limited number of beneficiaries, users need to fill out an application form to be eligible to obtain the benefits of this social tariff programme.[998] An important benefit granted to the users classified as 'social case' is that their drinking water services cannot be suspended by the utility company, and if it is, the services must be reinstated.[999]

C) Province of Buenos Aires

Decree 878 of 2003 on the supply of drinking water grants certain exemptions and subsidies to make access to drinking water affordable, particularly to certain users.

[994] Ley 26.221, Anexo 2, Artículo 76.

[995] See ERAS. Ente Regulador de Agua y Saneamiento, programas sociales, tarifa social, <http://www.eras.gov.ar/programas-tarifa%20social.asp> accessed 10 November 2012.

[996] Maria Cristina Caravino and Silvia Sudana Sanchez, 'Programa de Tarifa Social de la Empresa Aguas Argentinas SA. Reflexiones en torno al concepto de tarifa social y su implementación en el Área Metropolitana de Buenos Aires, (Trabajo presentado en el Segundo Congreso Nacional de Políticas Sociales, Política Social y Política Económica: Tensiones en Busca de Equidad, Mendoza, Septiembre de 2004) 7, <http://www.littec.ungs.edu.ar/pdfespa%F1ol/DT%2004-2004%20Cravino-Sanchez.pdf> accessed 10 November 2012.

[997] Resolución 112 de 2004, Determinase que todo usuario definido como 'caso social' será incluido como beneficiario del Programa de Tarifa Social, aun en los casos categorizados por el concesionario como usuario no residencial. Definición y requisitos para la inclusión como 'Caso Social'. Adoptado por el Ente Tripartito de Obras y Servicios Sanitarios -ETOSS-. Buenos Aires, 27/10/2004.

[998] Maria Cristina Caravino and Silvia Sudana Sanchez, 'Programa de Tarifa Social de la Empresa Aguas Argentinas SA. Reflexiones en torno al concepto de tarifa social y su implementación en el Área Metropolitana de Buenos Aires', (Trabajo presentado en el Segundo Congreso Nacional de Políticas Sociales, Política Social y Política Económica: Tensiones en Busca de Equidad, Mendoza, Septiembre de 2004) 8 and 9 <http://www.littec.ungs.edu.ar/pdfespa%F1ol/DT%2004-2004%20Cravino-Sanchez.pdf> accessed 10 November 2012.

[999] Resolución 112 de 2004, artículo 3. See also Maria Cristina Caravino and Silvia Sudana Sánchez, 'Programa de Tarifa Social de la Empresa Aguas Argentinas SA. Reflexiones en torno al concepto de tarifa social y su implementación en el Área Metropolitana de Buenos Aires', (Trabajo presentado en el Segundo Congreso Nacional de Políticas Sociales, Política Social y Política Económica: Tensiones en Busca de Equidad, Mendoza, Septiembre de 2004) 8 <http://www.littec.ungs.edu.ar/pdfespa%F1ol/DT%2004-2004%20Cravino-Sanchez.pdf> accessed 10 November 2012.

Article 63 exempts the Red Cross, buildings used only for recognised worship and properties of the Volunteer Fire Service, from payment for the service of drinking water. Under certain circumstances, public hospitals, first aid rooms and public schools are also exempted from charges for the service of drinking water, and connection fees.[1000] According to Decree 878 of 2003, a social tariff regime is to be established for those residential users with scant economic resources.[1001]

The utility company that provides drinking water service in this province (Aguas Bonaerenses S.A (ABSA)) offers two kinds of social tariffs. One tariff applies to individuals or families with scant economic resources, and another tariff applies to non-profit institutions that provide social services to the community. The latter grants a discount of 30 or 60 percent in the water bill of the eligible institutions, depending on the services they provide. For instances, nursing homes and community kitchens receive a discount of 60 percent, while libraries and social and sportive clubs benefit from a discount of 30 percent.[1002] On the other hand, the social tariff for individuals and families of scant economic resources covers 100 percent of their water bills. To be eligible for this benefit, families must fulfil the following conditions: 1) the income of the family must not exceed the current minimum living wage; 2) electric consumption of the family cannot exceed 330 KW/H bimonthly ; and 3) the family cannot have other discounts granted by ABSA.[1003]

It can be concluded that tariff regimes and social tariffs differ from province to province and create disparities among Argentine citizens. There is no uniformity in the provincial laws used as a mechanism to guarantee affordability for everyone and non-discrimination. To eliminate some of this disparity, a law was proposed to the National Parliament of Argentina in 2011 that would establish a social tariff for gas, electricity and water.[1004] However, even if the initiative is enacted it will not automatically apply to all provinces, since this legislative initiative only invites provinces and municipalities to join the regime described in that instrument.

5.3.1.1.4. Water quality

Herein some cases regarding water quality are analysed. Two cases are from the Province of Buenos Aires and a third case is adopted in the Province of Neumequen. In

[1000] Decreto 878 de 2003(adopted on 9 June 2003), Artículo 63 (A) (a).
[1001] Decreto 787 of 2003, Articulo 55.
[1002] Aguas Bonaerenses S.A. (ABSA), Tarifa de Interés Social Institucional (TISI), <http://www.aguasbonaerenses.com.ar/au-cyt-f-tarifa-de-interes-social-institucional-tisi.php> accessed 15 March 2013.
[1003] Aguas Bonaerenses S.A. (ABSA), Tarifa de Interés Social (TIS),
[1004] Honorable Camara de Diputados de la Nación, Proyecto de ley publicado en Tramite Parlamentario N. 186, on 5 December 2011 <http://www1.hcdn.gov.ar/proyxml/expediente.asp?fundamentos=si&numexp=6028-D-2011> accessed 5 February 2013.

the first case a citizen initiated an *amparo* action[1005] against Aguas Bonearenses S.A., alleging that the utility company was violating the drinking water quality standards of the National Food Code. The citizen also alleged that by providing water which did not comply with the quality standards, the company was infringing the constitutional rights to health, life and security. In the court of first instance, it was proven that the water provided to the population in the Lincoln area contained an excessive concentration of certain substances (chlorides, sulphates, and nitrates) that made the water unsuitable for human consumption according to article 982 of the Argentine Food Code. However, there was no clear evidence of people getting ill as a consequence of the long exposure to this water. Nevertheless, expert evidence indicated that infants, the elderly and sick people are more likely to be affected by drinking this water. The appellate Court declared that public health shares with environmental law the preventive and precautionary principles. These principles require firstly that the maximum concentration levels of chemicals must be respected to avoid potential harm to health, and secondly that corrective measures must be taken even though there is uncertainty about the extent of the harm or the percentage of the population that could be affected. The *amparo* action was decided in favour of the applicant and the defendant was ordered to take measures to bring drinking water quality in line with the standards in the Argentine Food Code. Meanwhile, the defendant was ordered to provide drinking water free of charge, whether in bottles or not, to the users in those segments of the population considered to be at risk: infants younger than three years, elderly persons above seventy years, and sick persons.[1006]

In a second *amparo* action[1007] against the Province of Buenos Aires a group of citizens, claiming the protection of the right to a healthy environment, asserted that the water provider and the Province should ensure that the quality of drinking water provided at their homes comply with the quality standards established by law. The plaintiffs were particularly concerned that the levels of arsenic, nitrates, and aluminium exceeded safe levels and might negatively affect the health of the inhabitants of the area. In this case it was known that the drinking water received at homes contained levels of arsenic and aluminium that exceeded the maximum concentration allowed by the Argentine Food Code and the recommendations of the WHO. Although the judgment did not explicitly mention the human right to water, it granted the petition and ordered the defendants to ensure that the provided drinking water complies with the standards established by law.

In the Province of Neumequen, the Community of Paynemil initiated an *amparo* action to protect the right to health of the children and the youth of the Community that were

[1005] *Conde Alberto José Luis v Aguas Bonaerenses S.A. (ABSA S.A),* amparo action, file No. 584-2008. Administrative Court of Appeals in San Nicolás, 30 October 2008.
[1006] *Conde Alberto José Luis v Aguas Bonaerenses S.A. (ABSA S.A),* amparo action, file No. 584-2008. Administrative Court of Appeals in San Nicolás, 30 October 2008.
[1007] *Florit, Carlos Ariel and others v Provincia de Buenos Aires and Aguas Bonaerenses S.A,* amparo action, file No. 4650, Judge Administrative, 6 July 2010.

affected by the consumption of polluted water. The water was contaminated with high levels of lead and mercury caused by a nearby exploitation of hydrocarbons. The action was initiated against the executive power of the province of Neumequen, since the government knew of studies that proved the unsafe quality of the water, which was used by the Paynemil Community for human consumption. The action was decided in favour of the Community and the judgment was appealed. The Appellate Court confirmed the decision of the court of first instance, which ordered the province: a) to guarantee 250 litres of water of good quality to each inhabitant; b) to ensure in the space of 45 days the provision of safe drinking water through any method for the affected people; c) to take the necessary measures to determine whether the consumption of contaminated water affected the health of the people, and if so, to adopt mechanisms to treat them; and d) to take the necessary measures to ensure the preservation of the environment.[1008]

5.3.1.1.5. Public participation.

The CESCR states in General Comment 15 that the right to water also incorporates access to information. Especially when water services are operated or controlled by third parties an effective regulatory system must be established, including public participation.[1009] The following case refers to the right to participate in decision-making processes that may affect the right to water. The legal regime governing the provision of drinking water in the Province of Buenos Aires requires a public hearing to be held before water tariffs can be increased.[1010]

In April 2012, Decree 245 was adopted[1011] in the Province of Buenos Aires, establishing a new tariff for drinking water service considerably increasing the price of water charged by the concessionaire Aguas Bonaerenses from $0.607[1012] to $1.693 per cubic metre. As a result, a number of citizens, the ombudsman and associations of users and consumers initiated an *amparo* action[1013] against the province of Buenos Aires and the utility company Aguas Bonaerenses. The applicants requested to repeal the tariff regime established by Decree 245. They alleged that prior to a tariff increase it was necessary to organise a public hearing according to the law, so users can have access to information and the opportunity to express their views. However, there was no involvement whatsoever by the users in the tariff review, nor were they informed of the reasons for the increase. Therefore, the right to public information was violated, particularly since

[1008] Menores de la Comunidad Paynemil S/Acción de Amparo", file No. 311-CA-1997, Civil Court of Appeals, Neuquén, 19 May 1997.
[1009] UN CESCR 'General Comment 15, the right to water' (2002) UN Doc. E/C.12/2002/11, para 24.
[1010] Ley 11820 (adopted on 28 August 1996, published 11 September 1996), Article 30.
[1011] Decreto 245 de 2012 (adopted 16 April 2012, published 27 April 2012)
[1012] Decreto 3144 de 2008(adopted 9 December 2008, published 19 January 2009), Aprobar el Régimen Tarifario para la Prestación de los Servicios de Agua Potable y Desagües Cloacales que Deberá Aplicar Aguas Bonaerenses S.A. Deja sin Efecto el Decreto 953 de 2007.
[1013] *Negrelli Oscar Rodolfo and others v Executive power and others*, amparo action, file No. 24994. Administrative Judge of First Instance, La Plata, 11 July 2012.

users could not participate in the decision-making. The *amparo* action was decided in favour of the applicants by declaring Decree 245 of 2012 null and ordering the water provider to maintain the old tariff. In addition, the utility company was required to refund to users the payments received based on the application of Decree 245.[1014]

This case demonstrates the importance of allowing public participation when decisions may affect the realisation of the human right to water, particularly regarding issues such as drinking water tariffs that may negatively affect the affordability of water services.

5.3.1.2. Chile

In several respects, Chile is unique among the four countries of this study in its recognition and protection of the human right to water. First, the human right to water is not explicitly included in the Chilean Constitution or national laws, although it is acknowledged in international conventions on human rights ratified by Chile, and there is little reference to this right in its jurisprudence. In addition, since the human right to water may conflict with the constitutional right to ownership of water, it is less likely that the former is effectively protected. The following case-law will show how issues concerning disconnection and water quality are being dealt with in Chile.

5.3.1.2.1. Access to water

The proportion of the population with access to improved drinking water sources in Chile was 98 percent in 2011. While in the urban area 100 percent of the population had access to improved drinking water, in the rural area the proportion of population with access to improved drinking water sources reached 90 percent.[1015]

There is an interesting case that reached the Supreme Court regarding access to water and the provision of free water to a commune that is not connected to the public water system. The municipality of Pozo Almonte was providing drinking water in a truck for free to a commune that was originally composed of 15 people, since they did not have access to water and such an action did not generate high costs for the municipality. Nowadays, this community is composed of about 150 people. The members of this commune initiated a *recurso de proteccion* against the municipality of Pozo

[1014] *Negrelli Oscar Rodolfo and others v Executive power and others*, amparo action, file No. 24994. Administrative Judge of First Instance, La Plata, 11 July 2012.

[1015] --'Progress on Sanitation and Drinking-Water 2013 Update', (World Health Organization and UNICEF 2013) 17 <http://www.wssinfo.org/fileadmin/user_upload/resources/JMPreport2013.pdf> accessed 3 October 2013.

Almonte.[1016] The plaintiffs alleged that the mayor of the municipality had ordered the municipality to cease providing drinking water to the community for free. They further alleged that this circumstance infringed their right to life, their right to equality before the law and their right to health, enshrined in article 19 numbers 1, 2, and 9 of the Constitution. The mayor indicated that it was necessary to stop the voluntary and free provision of drinking water, since the number of individuals living in that area is too large to continue assuming the cost of such a service. The Court concluded that the mayor has a margin of discretion regarding the allocation of financial resources for social actions. Thus, the manner in which limited resources are allocated to satisfy needs is the mayor's decision. For that reason, it is the prerogative of the mayor to decide whether or not free drinking water is provided to the commune, according to the availability of economic resources. Since the mayor did not commit an illegal or arbitrary action, the Court rejected all the petitions of the plaintiff.[1017]

In contrast, the following case does not confirm that such a margin of discretion is granted in all cases. A group of families living in an illegal settlement filed a *recurso de protección* against the municipality of Colina and the province where they are located. The families alleged that, although those authorities are aware of the existence of the settlement, they are not complying with their obligation to ensure the fundamental right to drinking water to the applicants. The 16 families that initiated the legal action live in an illegal settlement without access to basic services, including water and electricity. The Governor of the concerned province alleged and proved that she has complied with such obligations, since a water truck with a capacity of 10.000 litres was rented for the distribution of drinking water in certain areas of the municipality, including the settlement of the applicants. However, the actual distribution had to be done by the municipality, which was unwilling to provide the applicants with water, claiming they were located in an illegal settlement. According to the municipality, this group of families had been offered resettlement into other properties with access to public services, but they had refused the offer. The municipality also declared that since the applicants are settled in a piece of land that is of public use, the occupation is illegal and it would be inappropriate for the municipality to support illegal settlements. The Appellate Court of Santiago concluded that although the applicants are illegally occupying a land of public use and have not accepted the offer to be transferred to other properties that have access to basic public services, it is also true that these families are still living in their settlement without access to water. Therefore, given the essential character that water has for human development, the deprivation of this resource by the municipality constitutes a threat to the right to life, the right to health and the right to a healthy environment. The municipality is under the obligation to take the necessary

[1016] Supreme Court, Appeal recourse for protection, decision No. 5.319/2010, 23 September 2010.
[1017] Supreme Court, Appeal recourse for protection, decision No. 5.319/2010, 23 September 2010.

steps to ensure drinking water for every single family of the settlement until a final solution for this problem is found.[1018]

In another case, a citizen was deprived of access to water due to a change of the concession that provides the drinking water service. This citizen initiated a *recurso de proteccion*, alleging that his property right had been violated and he cannot use and enjoy his property since the new water provider cut off the drinking water service claiming that the plaintiff has a clandestine connection.[1019] The plaintiff affirmed that he had paid the connection fees to the previous water provider, and therefore, that his connection is legal and he is entitled to the restored provision of drinking water. In this case the Supreme Court agreed with all the arguments adopted by the Appellate Court, which asserted that although the behavior of the water provider did not affect the property right of the plaintiff, the company violated article 19, number 3, paragraph 4 of the Constitution that establishes as part of the right to fair trial, that nobody can be judged by a special commission. The Court decided in favour of the applicant and ordered the water company to reinstall the provision of drinking water to the plaintiff.

5.3.1.2.2. Availability and disconnection of water service

There is no doubt that the Chilean legal system allows utility companies to completely suspend the supply of drinking water for lack of payment of water bills.[1020] Judicial decisions of the Supreme Court uphold this legal regime when deciding some *recurso de proteccion* in favour of utility companies. When examining cases concerning the suspension of water supply, the Supreme Court[1021] observed that Decree with Force of Law 382, article 36 (d), authorises utility companies to cut off the supply of drinking water when the domestic user is in arrears. The Court ruled that there is no illegal or arbitrary action that violates the right to life enshrined in article 19 No. 1 of the Constitution as alleged by the applicants, since the actions taken by the utility companies by suspending the supply of drinking water due to lack of payment are in conformity with the law. There are other judicial decisions of Appellate Courts that share the Supreme Court's reasoning in cases with similar facts.[1022]

An interesting case to examine is a judgment of the Appellate Court of San Miguel which contradicts decisions of other Appellate Courts and the Supreme Court. Before the Appellate Court of San Miguel an individual initiated a *recurso de proteccion*[1023]

[1018] Court of Appeals of Santiago, Recourse for protection, decision No. 10140/2012, 28 June 2012.
[1019] Supreme Court, Appeal recourse for protection, decision No. 2.258/2005, 30 May 2005.
[1020] Decreto con Fuerza de Ley 382 (adopted 30 December 1988, published 21 June 1989) Ley General de Servicios Sanitarios), Artículo 36 (d).
[1021] Supreme Court, Appeal recourse for protection, decision No. 5.533/2007, 21 November 2007; Supreme Court, Appeal recourse for protection, decision No. 4353/2008, 20 November 2008.
[1022] Court of Appeals Temuco, Recourse for protection, decision No.106/2011, 1 March 2011; and Court of Appeals of Puerto Montt, Recourse for protection, decision No.229/2010, 24 December 2010.
[1023] Court of Appeals of San Miguel, Recourse for protection, decision No.101/2011, 14 October 2011.

claiming that the right to life was violated due to the suspension of the provision of drinking water by the utility company. The company explained that the applicant was in arrears and that a payment plan was agreed upon, which was then breached by the applicant. The company proceeded to suspend the drinking water after giving prior notice. Likewise, the utility company explained that article 36 (d) of Decree with Force of Law 382 authorises the provider to suspend the supply of the service when the user is not in compliance with the obligation to pay the water bills. Besides, article 38 of the same Decree allows the provider to terminate the contractual relationship with the user under certain circumstances, which can result in the suspension of the service for more than six months. Consequently, the Appellate Court requested the Constitutional Tribunal, through an action of inapplicability, to decide on the constitutionality of articles 36 (d) and 38 of Decree With Force of Law 382, so as to determine whether these provisions violated the fundamental right to life enshrined in article 19 No. 1 of the Constitution. However, once the action of inapplicability was submitted to the Constitutional Tribunal, the utility company quickly acted to restore the supply of drinking water to the applicant. Consequently, the Constitutional Tribunal considered that since the water service had already been restored to the applicant, a decision on the contested norms would not be decisive to solve the *recurso de protección*. Thus the petition was declared inadmissible.[1024] As a result, the Appellate Court of San Miguel declared that it did not have to take any measure to protect the allegedly violated fundamental right, since the water service had already been restored. Nevertheless, this Court clearly affirmed that access to water is a fundamental right protected under Article 19 No. 1 (right to life). It also recalled that the right to life is embedded in several international treaties ratified by Chile. Therefore, the utility company could not by invoking articles 36 (d) and 38 of Decree with Force of Law 382, and article 116 of Decree 1199 of 2004, suspend the provision of drinking water due to unpaid water bills. The Appellate Court ruled that these laws conflict with international conventions embedded in the Chilean legal system through article 5 of the Constitution. Moreover, the Appellate Court ruled that the laws invoked by the utility company are incompatible with article 19 No. 1 of the Constitution that enshrines the right to life.[1025]

It is unfortunate that the Constitutional Tribunal missed a great opportunity to decide whether suspending the supply of drinking water due to lack of payment of water bills violates the right to life and therefore, whether the legal provisions that allow such behaviour are unconstitutional. A decision from the Constitutional Tribunal on this issue could have given more clarity on recognition of the right to water.

In Chile the right to water is not protected for those persons who are unable to pay their water bills due to economic hardship. To the contrary, the existing legal regime offers great protection for utility companies in the event users of drinking water are not able to

[1024] Chilean Constitutional Tribunal, Ruling of unconstitutionality, decision No. 2039-11-INA, 20 September 2011.
[1025] Court of Appeals of San Miguel, Recourse for protection, decision No. 101/2011, 14 October 2011.

continue paying for the service. So far, no exceptions for disconnections have been made. Nor is there a reference in the legislation or in the jurisprudence to a minimum essential amount of water that must be guaranteed to individuals to satisfy their most basic human needs. There is no clear indication that this situation is likely to change. Thus, if the state does not guarantee access to a minimum amount of water for those that are living in a difficult socio-economic situation, it is difficult to conclude that Chile is complying with its obligation to safeguard the human right to water that is recognised in international treaties ratified by Chile.

5.3.1.2.3. Economic access

Until the end 1970's, the Chilean government granted a general subsidy for the price of drinking water, regardless of the income of the citizens, allowing access to this vital resource to all inhabitants.[1026]

The new legal framework adopted between 1988 and 1990 to promote a privatisation process was based on real tariffs without subsidies, which meant an increase in water prices. With the new regime it was important to make the population aware that drinking water is a product. Therefore, a cost must be incurred to obtain this product, just like any other good. It was thought that it was not possible to have sustainable services for water utilities when users perceived that the service should be for free. Therefore, the cost of this service had to be paid for by the consumers themselves based on their consumption.[1027] The general subsidy granted by the state was replaced by a system of direct subsidies, which would not distort prices in general, and was addressed only to low-income users, to provide them access to drinking water and sewage disposal services.[1028]

Law 18.778 established a national subsidy that would benefit residential users of low-income and rural systems.[1029] In the case of rural systems, the benefit is not granted to individuals but to the community or organisation of users. As a result, there are two kinds of benefits: a subsidy for consumption and a subsidy for investment.

[1026] Eugenio Celedón Cariola, Maria Angelica Alegria, 'Análisis del Proceso de Privatización de los Sistemas de Agua Potable y Saneamiento Urbanos en Chile' (2004) 1 (2) Revista de Gestión del Agua de América Latina 66, <http://www.eclac.org/drni/noticias/documentosdetrabajo/5/24325/Rega2.pdf> accessed 13 February 2013.

[1027] Damaris Orphanópoulos, 'Concepts of the Chilean Sanitation Legislation: Efficient Charges and Targeted Subsidies' (2005) 21 (1) Water Resource Development 200.

[1028] Eugenio Celedón Cariola, Maria Angelica Alegria, 'Análisis del Proceso de Privatización de los Sistemas de Agua Potable y Saneamiento Urbanos en Chile' (2004) 1 (2) Revista de Gestión del Agua de América Latina 67, 68.

[1029] Ley 18778 (adopted 17 January 1989, published 2 February 1989) Ley que Establece Subsidio al Pago de Consume de Agua Potable y Servicio de Alcantarillado de Aguas servidas.

A) Subsidy for consumption

The subsidy for consumption covers part of the total price of drinking water consumption and the sewage disposal service. The amount that is subsidised is paid by the respective municipalities[1030] and is granted to residential users of low income whether located in urban or rural areas. In order to be eligible for the subsidy the family group, as well as other individuals living in the same property, must: a) be unable to pay the total amount of the bills, due to their socioeconomic conditions which depend on their income, housing and assets; b) be up to date with water bills; and c) apply in writing for the benefit. The user will lose the subsidy if he/she does not fulfil the legal requirements, or if he/she does not pay the water bills for the unsubsidised part, accumulating three consecutive bills.[1031] The subsidy covers a percentage of both fixed costs and variable charges. The latter is based on actual consumption and the subsidy applies only to a maximum amount of cubic metres that is established by a formulae. The percentage of the subsidy cannot be lower than 25 percent or higher than 85 percent of the charges and must be the same for all beneficiaries of the same region that are subject to equal tariffs and that are on a similar socioeconomic level.[1032] The subsidy is granted for three years, after which the user must apply again for the benefit.

There is an additional programme that provides subsidies for people in a vulnerable situation. Families that are beneficiaries of the programme 'Chile solidario'[1033] and comply with the legal requirements, will receive a subsidy of 100 percent of the fixed and variable charges up to a maximum consumption that does not exceed 15 cubic metres per month[1034], which represents approximately 500 litres per family per day.

B) Subsidy for investment

The subsidy for investment applies only to rural areas. One of the differences between the subsidy for investment and the subsidy for consumption is that the latter is granted to a specific family, while the former is awarded to an organisation of users or to a community.

The subsidy for investment can be granted with two purposes: a) to make studies to analyse whether it is possible to build a rural system for drinking water or to improve an existing one; b) to improve, extend or repair an existing rural system for the provision of drinking water or sewage disposal. The granted subsidy amount will be the difference between the total investment costs in the system improvements or study and the

[1030] Decreto 195 (adopted 19 February 1998, published 17 July 1998) Aprueba Reglamento de la Ley No 18.778, que Establece Subsidio al Pago de Consumo de Agua Potable y Servicio de Alcantarillado de Aguas Servidas, Artículo 2 (a).
[1031] Ley 18778, Artículo 5.
[1032] Ley 18778, Artículo 2.
[1033] Chile Solidario is a programme dedicated to assist individuals and families that are in a vulnerable situation. It is oriented to help people to overcome extreme poverty. Ministerio de Desarrollo Social, Chile Solidario, 'Que es Chile Solidario?', <http://www.chilesolidario.gob.cl/sist/sist1.php> accessed 20 February 2013.
[1034] Decreto 195, Artículo 3 bis.

contribution that the organisation of users can make based on their economic capacity.[1035] To obtain this benefit, rural communities need to submit a request to the representative of the Ministry of Public Works in their region. This Ministry will organise the projects per regions in a list that will be presented to the Ministry of Finance in order to obtain the economic resources that are necessary for the financing of the projects. Once these annual budgets have been approved, the regional allocation will be awarded.[1036]

5.3.1.2.4. Water quality

Water quality has also been examined in the Chilean jurisprudence. The following is a case involving water contamination. The residents of the neighbourhood councils of two villages situated in the rural area of the Region of Antofagasta, initiated a *recurso de protección* against the municipality where they are located. They alleged that their right to life and their right to a healthy environment, enshrined in the Constitution (article 19, numbers 1 and 8), were being violated because the drinking water supply for these villages contains high levels of arsenic. The plaintiffs further alleged that there are two arsenic abatement plants connected to the water system, but that the plants were closed down by a municipality decision.[1037]

The mayor of the municipality affirmed that the abatement plants are not in good condition to provide the services for which they were designed. Also, it is not the responsibility of the municipality to supply drinking water to that population, since they are located in a rural area where this task is the responsibility of the community through the Committee on drinking water. The Appellate Court of Antofagasta, after analysing the information provided by the parties to the case and after ordering some additional information, decided to refuse the allegations of the mayor of the municipality. Firstly even though the plants show some signs of deterioration, they can be conditioned to work properly. Secondly, because it was the municipality that prepared a project for the construction of the plants where municipal and regional resources were invested. Furthermore, the Appellate Court affirmed that the municipality had committed an illegal and arbitrary omission, since there was no objective or legal reason to stop the operation of the plants. These circumstances impeded the provision of adequate drinking water, therefore violating the right to life, the right to health and the right to a healthy environment, which are protected by the Constitution.[1038] Consequently, the Appellate Court granted the protection of the aforementioned rights and ordered the mayor of the municipality to bring back into operation the abatement plants to eliminate the excess arsenic in the water to the limits established in national legislation.

[1035] Decreto 195, Artículos 25-26.
[1036] Decreto 195, Artículos 27 al 30.
[1037] Supreme Court, Appeal recourse for protection, decision No. 3.975/2005, 25 August 2005.
[1038] Supreme Court, Appeal recourse for protection, decision No. 3.975/2005, 25 August 2005.

The judgment was subject to appeal before the Supreme Court of Justice, which upheld the decision.[1039] This judgment is an effort to ensure access to safe drinking water to the affected people, and to protect the human right to water, although not explicitly mentioned in the decisions, as a right that derives from the right to life, the right to health and the right to a healthy environment.

5.3.1.3. Colombia

In Colombia the *tutela* action has been recognised as the most effective mechanism to protect the human right to water. Herein we will examine some *tutela* actions revised by the Constitutional Court. The following legislation and case-law will show how issues concerning access to water, disconnection and water quality are being dealt with in this country.

5.3.1.3.1. Access to water

The proportion of population in Colombia using improved drinking water sources reached 93 percent in 2011. In the urban areas about 100 percent of the population had access to improved sources of drinking water, while only 72 percent of the rural population had access to improved drinking water sources.[1040]

The Constitutional Court declared that the right to water is violated when access to the appropriated and necessary installations for the provision of drinking water is denied. For instance, in cases where utility companies refuse to install the necessary water connection, or when these companies impose disproportionate charges as a condition to supply the water system infrastructure, the Court has concluded that there is a violation of the right to water and has ordered utility companies to connect users to the water system, allowing them only to charge users for the installation cost, but not for the cost of technical studies, plans, licences, and similar items.[1041]

Nevertheless, when the residential property of a potential user does not fulfil the minimum requirements established under Decree 302 of 2000[1042] for the connection of the service of drinking water, the Constitutional Court has declared that utility companies are not obliged to connect new users to the water system, until the property

[1039] Supreme Court, Appeal recourse for protection, decision No. 3.975/2005, 25 August 2005.
[1040] --'Progress on Sanitation and Drinking-Water 2013 Update', (World Health Organization and UNICEF 2013) 19 <http://www.wssinfo.org/fileadmin/user_upload/resources/JMPreport2013.pdf> accessed 3 October 2013.
[1041] Colombian Constitutional Court, T-312 of 2012, Judge Rapporteur: Luis Ernesto Vargas Silva, 26 April 2012, para 15.
[1042] Decreto 302 de 2000 (adopted on 25 February 2000, entered into forced 29 February 2000), por el cual de reglamenta la Ley 142 de 1994, en material de prestacion de los servicios publicos domiciliarios de acueductos y al cantarillado.

complies with all requirements. For instance, through a *tutela* action[1043] an applicant requested that his property should be connected to the water system since he did not have access to this service. The utility company declined this request since the property of the applicant did not comply with the minimum requirements established in Decree 302 of 2000, mainly because the house was not connected to the public sewage system, nor did it have a system for treatment and adequate disposal of the sewage. In fact, the untreated domestic wastewater produced in the applicant's property was being discharged into a nearby stream. The utility company explained that there was a technical problem in connecting this property to the public sewage system since for some reason the property was constructed below the level of the sewer. The Constitutional Court found that the utility company had justified legal reasons to refuse to connect the property to the water system. Nevertheless, in order to avoid a violation of the right water, the Court requested the owner of the property to take the necessary measures to ensure adequate disposal of domestic wastewater through the sewage system of the area, by setting up a pumping system for wastewater to avoid more environmental and sanitation problems. The Court also ordered the utility company to connect the property to the drinking water system once the measures are implemented by the user, since the property would then comply with the minimum requirements to have access to the service.[1044]

5.3.1.3.2. Availability and disconnection of water services

In 2001 the Framework Law for the provision of household utilities was modified by Law 689 of 2001. Article 18 of this Law provides that when the user is in arrears in paying his or her water bills, the utility company is under the obligation to suspend the supply of the service. The Constitutional Court analysed the constitutionality of this law and decided that article 18 of Law 689 of 2001 was valid and in accordance with the principles of the Constitution. The Court said that payment for the supply of household utilities is an indispensable condition for this type of contract, because citizens must contribute to the expenditure and investment of the state as part of the principles of justice and equity.[1045]

[1043] Colombian Constitutional Court, T-312 of 2012, Judge Rapporteur: Luis Ernesto Vargas Silva, 26 April 2012.
[1044] Colombian Constitutional Court, T-055 of 2011, Judge Rapporteur: Jorge Ivan Palacio Palacio, 4 February 2011.
[1045] Colombian Constitutional Court, C-150 of 2003, Judge Rapporteur: Manuel José Cepeda Espinosa, 25 February 2003, para 5.1.1.

According to the jurisprudence of the Constitutional Court, water providers are generally empowered to suspend drinking water service when the users have stopped paying their water bill for more than two periods of invoicing when the bills are issued bimonthly and three periods when the invoicing is done monthly. However, this suspension has two restrictions. Firstly, such a suspension must be practiced observing the rules of due process. Secondly, suspension of drinking water services cannot take place if it infringes the rights of persons under special constitutional protection.[1046] The Constitutional Court has explained that this second exception also applies to establishments that have been granted special constitutional protection, such as hospitals, prisons and educational institutions that enable a community to enjoy certain fundamental rights.[1047] If an establishment specifically protected by the Constitution is subject to suspension of the supply of drinking water due to lack of payment, and that suspension has the effect of infringing fundamental rights of protected persons or a whole community, or if it impedes the normal functioning of a hospital or similar establishment, the utility company must continue to provide the service to the user in arrears. In these cases the protection of human rights must prevail over the economic interest.[1048]

Concerning the special protected persons, the Constitutional Court expresses that this group emanates from article 13 of the Constitution, which provides that the state will especially protect those individuals who, on account of their economic, physical or mental conditions, are obviously vulnerable. Especially protected persons are groups of individuals that are identified by the Constitution (pregnant woman, mother head of a family, elderly, children, teenagers, and handicapped) or the jurisprudence of the Constitutional Court (ethnic groups, persons deprived of their liberty, displaced people, among others) as in need of particular protection of their fundamental rights due to their special circumstances. [1049] Therefore, in the event that a person under special constitutional protection is delayed in the payment of two or three consecutive bills, the provider must inform the user about his or her debt and the required payment procedures. If the user is unable to settle the debt immediately, the provider must keep supplying the service and agree with the user on a flexible payment plan taking into account the user's economic situation, with the purpose that the user can make the payments for the service provided. Once a flexible payment plan is agreed to, if the user demonstrates that he/she does not have the economic capacity to pay for this basic service, the utility company must install a water flow restrictor in order to guarantee at

[1046] Colombian Constitutional Court, C-150 of 2003, Judge Rapporteur: Manuel José Cepeda Espinosa, 25 February 2003, para 5.2.2. See also Colombian Constitutional Court, T-717 of 2010, Judge Rapporteur: Maria Victoria Calle Correa, 8 September 2010, para 29, 48.1.
[1047] Colombian Constitutional Court, T-740 of 2011, Judge Rapporteur: Humberto Antonio Sierra Porto, 3 October 2011.
[1048] Colombian Constitutional Court, C-150 of 2003, Judge Rapporteur: Manuel José Cepeda Espinosa, 25 February 2003, paras 5.2.2., 5.2.2.2., 5.2.3.
[1049] Colombian Constitutional Court, T-740 of 2011, Judge Rapporteur: Humberto Antonio Sierra Porto, 3 October 2011.

least 50 litres of water per person per day, or it must provide the user with a public source of water that supplies an equal amount of water.[1050] Non-compliance with the previously mentioned requirements by the company, i.e. agreeing on a flexible payment plan and guaranteeing a minimum amount of drinking water to those in arrears, will compel the provider to assume the full cost of the service until the economic situation of the user under special constitutional protection changes. In any event the utility company responsible for supplying drinking water has the right to recover the amount owed by the user, through the appropriate legal actions.[1051]

In turn, the user who claims to be under constitutional protection and seeks to continue receiving the provision of minimum amounts of drinking water, despite the lack of payment, must attest that: 1) in his or her dwelling there is at least one subject under special constitutional protection; 2) the suspension of the service can impede his or her constitutional rights; and 3) the lack of payment of the water bills is due to involuntary, insurmountable and uncontrollable circumstances. The main idea is to satisfy the needs of the subject under special constitutional protection to guarantee him or her a dignified life.[1052]

The Constitutional Court analysed a case concerning the violation of the right to water of persons deprived of their liberty. A prisoner initiated a *tutela action* seeking the protection of the right to a dignified life and the right to health that were infringed by the lack of drinking water. The prisoner alleged that he received 15 or 20 minutes of water three times a day, which is not enough to satisfy his needs, and the needs of the other 400 prisoners, to take a shower, wash their clothes, and wash their cells and halls.[1053] In its judgment the Court asserted, that based on international human rights, a certain minimum amount of water must be guaranteed to prisoners, taking into account, inter alia, the following circumstances: 1) the proper functioning of the sanitary installations; 2) the amount of physical exercise that prisoner are doing; 3) high temperatures; and 4) the illness they are suffering from. The Constitutional Court indicated that the IAComHR establishes other criteria for persons deprived of their liberty. Therefore, the Constitutional Court took into account criteria provided by the IAComHR, which established that a minimum of 13 to 15 litres of water per person per day should be provided when the sanitary installations are working properly. In this case, the Court decided that because there are multiple problems with showers and toilets, and because the prison is located in a region that is quite hot, 25 litres of water

[1050] Colombian Constitutional Court, T-928 of 2011, Judge Rapporteur: Luis Ernesto Vargas Silva, 7 December 2011, para 39; Colombian Constitutional Court, T-740 of 2011 Judge Rapporteur: Humberto Antonio Sierra Porto, 3 October 2011; Colombian Constitutional Court, T-077 of 2013, Judge Rapporteur: Alexei Julio Estrada, 14 February 2013.
[1051] Colombian Constitutional Court, T-740 of 2011, Judge Rapporteur: Humberto Antonio Sierra Porto, 3 October 2011.
[1052] Colombian Constitutional Court, T-717 of 2010, Judge Rapporteur: Maria Victoria Calle Correa, 8 de septiembre de 2010, para 48.
[1053] Colombian Constitutional Court, T-077 of 2010, Judge Rapporteur: Alexei Julio Estrada, 14 February 2013, paras 5-8.

per person per day must be provided, from which 5 litres can be stored by the prisoners within their cells.[1054]

5.3.1.3.3. Economic access

Colombia has adopted mechanisms that ensure the affordability of drinking water. Law 142 of 1994[1055] establishes a regime of economic and social stratification and requires each municipality to classify the residential properties that receive household utilities in different strata. This classification must be done in six different strata according to certain factors and taking into account the household utilities that the residential properties already received. According to this socioeconomic stratification, one represents the lowest socioeconomic stratum, while six is the highest socioeconomic stratum. This stratification is also used to determine the groups of residential houses that can be beneficiaries of subsidies. In accordance with Law 142, only users that inhabit residential properties of strata one and two, and under certain conditions stratum three, are eligible to receive subsidies.[1056]

Article 99 of Law 142 of 1994 provides that subsidies will not exceed, in any case, the value of basic or subsistence consumption. This instrument states that the municipalities have primary responsibility for granting subsidies and secondarily, the Departments and the Nation. Therefore, mayors are required to take the necessary measures to create a municipal budget for the purpose of subsidising the basic water consumption for low-income users and to extend the coverage and improve the quality of drinking water and sanitation. Mayors should also give priority to these expenses over other expenses.[1057] On the other hand when the Nation or Departments grant subsidies, these must preferably target the municipalities with fewer resources since they may not have the capacity to grant subsidies with their own resources. Law 142 clearly aims at guaranteeing access to drinking water to all users, including those with the lowest incomes.

Article 87 of Law 142 sets limits on the tariff regime for household utilities. This regime is based on certain criteria, including: solidarity, redistribution, simplicity and transparency. Solidarity and redistribution are understood as the contributions made by the users of higher strata (5 and 6) as well as industrial and commercial users to help users of lower strata (1, 2, and in some cases 3) to pay some fees for the supply of household utilities that meet their basic needs. With this purpose some solidarity funds were created. Simplicity and transparency means that the tariff should be clear, easy to

[1054] Colombian Constitutional Court, T-077 of 2010, Judge Rapporteur: Alexei Julio Estrada, 14 February 2013, para 38.
[1055] Ley 142 de 1994 (adopted on 11 July 1994, published on 11 July 1994), por la cual se establece el régimen de los servicios públicos domiciliarios y se dictan otras disposiciones, Articles 101-104.
[1056] Ley 142 de 1994, Arículo 99 (99.7).
[1057] Ley 142 de 1994, Artículo 99 (99.5).

control and public. This Law also allows providers of household utilities to freely set the tariff for their services only if there is market competition and when the company does not have a dominant position.[1058]

Over the last years, two of the major cities in Colombia, Bogotá and Medellin, decided to work on the realisation of the human right to water, particularly focusing on the most vulnerable groups of people. These cities focus on granting economic access to water resources in order to ensure the realisation of this right.

A) The city of Medellin

Medellin was the first city in Colombia that offers its inhabitants a minimum amount of drinking water for free to satisfy their most basic human needs. The Programme was initially called *Plan litres of love*. The programme was set in motion in May 2009. The families that can benefit from this programme are those classified, according to a special national system known as SISBEN[1059], as being in a precarious and poor situation. The programme *litres of love* was part of the Development plan of 2008-2011. In order to guarantee the continuity of this programme the Municipal Council of the city of Medellin adopted Agreement 06 on 13 April of 2011 and called it Minimum Vital of Drinking Water Programme. According to this Agreement, the main purpose is to ensure that the most vulnerable and poorest people have access to indispensable amounts of drinking water to guarantee their right to a dignified life. Hence the municipality provides 2.5 cubic metres (2.500 litres) of drinking water per month and sanitation free of cost, including all fixed charges for these services, to each one of the users in each household that is classified as being in a vulnerable and poor situation. [1060]

This Agreement opened up the possibility for families that have overdue accounts on water bills to be part of the programme. Agreement 06 established that those persons classified by the SISBEN, as being in a precarious and poor situation, whose provision of public services have been suspended, can become part of the programme if they have agreed on a payment plan with the provider of public services in Medellin. In this case, the benefit of this programme can also be used to pay the first instalment of the payment plan.[1061]

[1058] Ley 142 de 1994, Artículo 88 (88.2) (88.3).
[1059] The SISBEN is a national system for the identification of the most vulnerable and poor people of Colombia. The people classified under this programme are the potential beneficiaries of social programmes since they are in need of assistance.
[1060] Acuerdo 06 de 2011, "por medio del cual se institucionaliza el programa mínimo vital de agua potable", (adopted on 13 April 2011, by the Municipal Council of the city of Medellin, Antioquia), Artículo 1.
[1061] Acuerdo 06 de 2011, Artículo 3, parágrafo; y Artículo 6 (6.2).

Subsequently, the Programme Minimum Vital of Drinking Water was regulated by Decree 1889, adopted on 1 November 2011, by the Mayor of the city of Medellin.[1062] Decree 1889 establishes the necessary requirements to be eligible to receive the benefit of the minimum vital of drinking water. This Decree includes a new group of families that are registered as being in a situation of displacement that can also be eligible for this benefit. With the programme 'Minimum Vital of Drinking Water' the city of Medellin is moving towards real protection of the human right to water for those who are in a disadvantaged economic situation.

B) The city of Bogotá

On 15 February 2012 the mayor of the city of Bogotá adopted Decree 064. This Decree recognises the right to a minimum amount of drinking water for groups of people with low income. This Decree aims to implement the water plan for the District of Bogotá, adopted by the Mayor under Decree 485 of 3 November 2011.

According to Decree 064, the provider of drinking water services for the city (Empresa de Acueducto y Alcantarillado de Bogotá) must guarantee an amount of six cubic metres per month (6.000 litres) free of cost for people living in households classified in stratum one and two.[1063] With this decree the mayor of Bogotá implements Resolution 64/292 adopted by the General Assembly of the UN on 28 July of 2010 that recognises the human right to water. It is expected that more than 3 million people, living in the city of Bogotá, will have access to a minimum amount of drinking water to satisfy their basic vital needs. This means that about 39 percent of the users of the water provider of Bogotá will receive 6.000 litres of drinking water free of costs every month. Nevertheless, users need to continue to pay for the sewage system and the service of transporting the water.[1064]

Based on information given by the provider of drinking water in Bogotá this benefit is, so far, fully funded for four years (2012-2015).[1065] This initiative is paid for by the

[1062] Decreto 1889 de 2001, por medio del cual se reglamenta el Acuerdo 06 de 2011 "por medio del cual se institucionaliza el Programa Mínimo Vital de Agua Potable" (Adopted 1 November 2011 by the Mayor of Medellin).

[1063] Decreto 064 de 2012, Artículo 1.

[1064] Acueducto Agua y Alcantarillado de Bogotá, 'ABC del Mínimo vital de Agua en Bogotá' <http://www.acueducto.com.co/wpsv61/wps/portal/!ut/p/c5/hY7LDoIwEEW_yMyl0BaX9UEpAappfMCGNIYYEgEXxsS_V-PGmKgzy3PvmaGaHjv4a3f0l24c_In2VIsmDlzhZMqglRIwM6ZXygGFDR68Es1cqzSSOWDZFmAld2tsXAgT_mnvnvfeEzyZwlg-zW2hA4C_-C__k-PLKHz4rWQLGLVcxiKMspkSVKZj31JFtfzyp46ykKpTe_SHG537PTozSe5PLYsi/dl3/d3/L0lJSklna2shL0lCakFBTXlBQkVSQ0lBISEvWUZOQzFOS18yN3chLzdfODFTTVM3SDIwR0FBNjBJQjJHUEFTMEc0SjM!/?WCM_PORTLET=PC_7_81SMS7H20GAA60IB2GPAS0G4J3_WCM&WCM_GLOBAL_CONTEXT=/wps/wcm/connect/eaabv6/sacueducto/minvital/aminvitalsecprincipal/aminvitalabcminimoo> accessed 9 January 2013.

[1065] Empresa de Acueducto y Alcantarillado de Bogotá, 'El mínimo vital no lo pagan los usuarios de otros estratos', <http://www.acueducto.com.co/wpsv61/wps/portal/!ut/p/c5/hY09D4IwGIR_kelRaAvji2JbA1TTqMhCGIwhEXAw_n4hLsZEvRuf-2A1mzy0j-7S3rtxaK-

district[1066] through the provider of drinking water of the city, Empresa de Acueducto y Alcantarillado de Bogotá, which is a state-owned company.

5.3.1.3.4. Water quality

In situations of bad water quality the Constitutional Court also grants the protection of the fundamental right to water. The Court has determined that there is a violation of the obligation to provide water of good quality when utility companies do not treat water that is to be provided for human consumption, or when there is no cleaning and maintenance of the water storage tanks, which causes the water to become undrinkable.[1067]

For instance, in the municipality of Aipe the government constructed an aqueduct to provide water to its inhabitants to satisfy their water needs. However, the water that is provided through such pipelines was contaminated with high levels of iron, causing health problems to the inhabitants and particularly the children. As a result the community was told to stop using the water for human consumption. To satisfy their water needs, the inhabitants of the municipality of Aipe were obliged to collect water from the nearest river, water that was also not fit for human consumption. Faced with this situation, the inhabitants of the municipality of Aipe initiated a *tutela* action to obtain the protection of their right to life and health.[1068] The Constitutional Court decided to grant the protection of the mentioned rights and asserted that the use of water not fit for human consumption causes a serious risk to the population. For the Court it was clear that there is an infringement to the right to life and the right to health when the provision of water is deficient or when the water contains substances not fit for human consumption. As a result, the municipality was ordered to conduct the necessary maintenance work to the pipelines to guarantee good water quality, as a provisional measure. Likewise, the municipality was granted a period of six month to initiate the

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[1066] Decreto 485 de 2011 (adopted on 3 de November 2011 by the designated Mayor of Bogota, D.C.), Artículo 9 "El costo del Mínimo Vital de Agua Potable de que trata el Artículo 4 del presente Decreto será incorporado anualmente en el presupuesto de la Secretaria Distrital de Hacienda".

[1067] Colombian Constitutional Court, T-740 de 2011, Judge Rapporteur: Humberto Antonio Sierra Porto, 3 October 2011; Colombian Constitutional Court, T-410 of 2003, Judge Rapporteur: Jaime Córdoba Triviño, 22 May 2003.

[1068] Colombian Constitutional Court, T-092 of 1995, Judge Rapporteur: Hernando Herrera Vergara, 2 March 1995.

execution of works to construct a new pipeline that will effectively guarantee access to clean drinking water.[1069]

5.3.1.4. Bolivia

Since the right to water is enshrined in the Bolivian Constitution and the appropriate mechanism for its protection is the *amparo* action, we will examine some *amparo* actions reviewed by the Constitutional Tribunal.

5.3.1.4.1. Access to water

In 2011, 96 percent of the proportion of population in urban areas had access to improved drinking water sources, while only 72 percent of the rural population had access to improved drinking water.[1070]

The Constitutional Tribunal examined a large number of cases regarding the protection of access to drinking water when the access had been denied or impeded by third parties, such as landlords and neighbours among others.[1071] In two cases, although related to the suspension of drinking water in properties used for commercial or professional uses, the Constitutional Tribunal mentioned that the right to drinking water is recognised as a fundamental right by the Constitution in its article 20. Basic drinking water services are a state responsibility at all levels of government. This Tribunal also states that third parties that deprive other individuals of the basic supply of drinking water service are committing an illegal or arbitrary act by abusing their power.[1072]

For instance, in the municipality of Vinto, around 77 families did not have access to drinking water services. The association of drinking water and sanitation of the community was requiring them to pay $300 (US) for the water connection. Nevertheless, once the families agreed to pay this amount, the association denied them the right to water because the families were following a different political leader. As a

[1069] Colombian Constitutional Court, T-092 of 1995, Judge Rapporteur: Hernando Herrera Vergara, 2 March 1995, para III.

[1070] --'Progress on Sanitation and Drinking-Water 2013 Update', (World Health Organization and UNICEF 2013) 17 <http://www.wssinfo.org/fileadmin/user_upload/resources/JMPreport2013.pdf> accessed 3 October 2013.

[1071] See Bolivian Constitutional Tribunal, constitutional decision 0994/2013, Judge Rapporteur: Neldy Virginia Andrade Martínez, 27 June 2013; Bolivian Constitutional Tribunal, constitutional decision 1185/2013, Judge Rapporteur: Soraida Rosario Chánez Chire, 31 July 2013; Bolivian Constitutional Tribunal, constitutional decision 1341/2004-R, Judge Rapporteur: Elizabeth Iñiguez de Salinas, 19 August 2004.

[1072] Bolivian Constitutional Tribunal, constitutional decision 0071/2010-R, Judge Rapporteur: Juan Lanchipa Ponce, 3 May 2010, para III.3.

result, a popular action[1073] was initiated in order to obtain the protection of their right to water as a group. The Constitutional Tribunal in judgment 0422/2013-L of 2013 granted the protection of the right and asserted that the service of drinking water must be accessible to all, particularly to those most vulnerable or marginalised groups without discrimination. The Tribunal ruled that discrimination in access to drinking water cannot be made through public policies or in fact. The Constitutional Tribunal ordered the mayor of the municipality of Vinto to assume its competences regarding the protection of the right to water to the inhabitants of its municipality. It granted the municipality 48 hours to start the procedures and works to provide a water connection to the affected community.[1074]

5.3.1.4.2. Availability and disconnection of drinking water services

In Bolivia there are two legal instruments that authorise water providers to cut off the supply of drinking water to users that are in arrears with their water bills. Article 79 of Regulation 510 of 1992 authorises utility companies to cut off the drinking water supply once one or more water bills are 60 days in arrears after their issue date. In the same way, article 73 of Law 2066 provides that drinking water providers shall not sanction users by cutting off their supply of drinking water, except under certain circumstances, such as lack of payment for the service.

In Bolivia there is very little jurisprudence where the Constitutional Tribunal examines cases about the violation of the right to water as a result of the disconnection of drinking water service by water providers due to domestic user's failure to pay for the service.

There is one judgment of the Constitution Tribunal[1075] where the plaintiff claimed the reconnection to the drinking water service, which had been cut off due to the non-payment of bills over a long period by the previous owner of the property. The plaintiff, as the new owner of the property, claimed that the actual debt did not belong to her, but to the previous owner. Therefore, she had the right to be reconnected in order to have access to drinking water. The Constitutional Tribunal ruled that the utility company acted according to the law. Although article 73 of Law 2066 establishes that utility companies cannot use the suspension of the service as a punishment mechanism against users, it grants an exception to this rule when users are in arrears for a period that exceeds the limit established by law. The Tribunal explained that this provision establishes an exception regulated by article 79 of Regulation 510, allowing utility companies to suspend a user's water supply for the non-payment of one or two water

[1073] Bolivian Constitutional Tribunal, class action, decision 0422/2013-L, Judge Rapporteur: Zenón Hugo Bacarreza Morales, 3 June 2013.
[1074] Bolivian Constitutional Tribunal, class action, decision 0422/2013-L, Judge Rapporteur: Zenón Hugo Bacarreza Morales, 3 June 2013.
[1075] Bolivian Constitutional Tribunal, constitutional decision 0777/2003-R, Judge Rapporteur: René Baldivieso Guzmán, 20 June 2003.

bills. Furthermore, the Tribunal recognised that Law 2066 (article 73) and Regulation 510 (article 79) authorise the suspension of the drinking water supply in order to protect the interest of utility companies that supply this service.[1076]

On the other hand, there are many judgments where the plaintiffs in which the violation of the human right to water (after the constitutional reform in 2009) and the violation of the right to life and health (before 2009) as a result of the suspension of drinking water service by individuals, such as landowners or organisations other than water providers. In those cases, the Constitutional Tribunal declares that the law only authorises water providers to cut off the supply of drinking and if anybody else does so, it would be an illegal action that could violate the protected rights.

In a case in 2004[1077] the plaintiff alleged the violation of the right to life and the right to health since the Homeowner's Association of the building where she was living decided to cut off her drinking water as a constraining measure to demand the payment for services (administrative and water services) the Association had provided. In this case the Constitutional Tribunal cited article 79 of Regulation 510 of 1992 and article 73 Law 2066 of 2000, which only allows water providers to cut off the service due to lack of payment of the water bills for more than 60 days. The Tribunal declared that the Homeowner's Association, by cutting off the drinking water supply to the plaintiff without being authorised to do so, took the law into its own hands and violated the right to life and the right to health.[1078]

In another case[1079], the plaintiff alleged the violation of her human right to water since the respondents had destroyed the water pipes, the kitchen and the bathroom of the property where the plaintiff was living. Consequently, she was denied access to water to satisfy her basic needs, such as cooking and personal hygiene. The Constitutional Tribunal stated that this action constitutes a violation of the fundamental right to access to water, therefore threatening the rights to life and health. The Tribunal ruled that the positive obligation to respect human rights, which normally falls to the state, can also be imposed on private individuals (third parties) when they might be in a position to violate human rights. The obligation for individuals to respect human rights derives from the obligation of the state to establish a legal system that regulates the relationship between individuals. This should guarantee that human rights are respected in those

[1076] Bolivian Constitutional Tribunal, constitutional decision 0777/2003-R, Judge Rapporteur: René Baldivieso Guzmán, 20 June 2003, para III.2.
[1077] Bolivian Constitutional Tribunal, constitutional decision 1341/2004-R, Judge Rapporteur: Elizabeth Iñiguez de Salinas, 19 August 2004.
[1078] Bolivian Constitutional Tribunal, constitutional decision 1341/2004-R, Judge Rapporteur: Elizabeth Iñiguez de Salinas, 19 August 2004, para III.1.
[1079] Bolivian Constitutional Tribunal, constitutional decision 0251/2012-R, Judge Rapporteur: Soraida Rosario Cháñez Chire, 29 May 2012.

private relationships, otherwise the state can be held liable for the violation of those rights.[1080]

Based on the jurisprudence of the Constitutional Tribunal, it is clear that the Bolivian legislation only authorises water providers to cut off the supply of drinking water service when users, including domestic users, are more than sixty days in arrears with at least one water bill. Nevertheless, there are not many cases where water providers have suspended drinking water service due to lack of payment. In fact, most of the cases dealing with suspension of the services concern individuals or organisations preventing other individuals to have access to drinking water services.

It is surprising that although the human right to water is recognised in a number of provisions in the Constitution, the Constitutional Tribunal in its jurisprudence does not question at any time the validity of the laws that authorise a complete disconnection of drinking water when domestic users with low income are in arrears with one or more bills. Nor does the Constitutional Tribunal make any reference whatsoever to the minimum amount of water that should be guaranteed to all individuals so they can satisfy their most vital human needs, even when they cannot afford to pay for the water.

5.3.1.4.3. Economic Access

In Bolivia, there is no national regulation on water tariffs. Perhaps this is due to the constant structural changes of the regulatory bodies created after the privatisation process. The Authority of Drinking Water and Sanitation (Autoridad de Fiscalización y Control Social de Agua Potable y Saneamiento Básico, AAPS), the entity in charge of controlling and monitoring operators of drinking water services, is working on a homogeneous national tariff scheme based on the following categories: domestic, commercial, industrial and governmental users.[1081]

Concerning subsidies or other mechanisms that ensure affordability, the AAPS has created different benefits in order to guarantee access to drinking water to particular groups of users. A first benefit was established in 2011, aiming to protect vulnerable groups of people. For this reason, the social-solidarity category (categoría social-solidaria) was established by an administrative resolution. This category comprises non-profit institutions (such as homes for the elderly, orphanages and centres for the rehabilitation of disabled persons), which fulfil a function of assistance to highly vulnerable sectors of the population.[1082] The benefit for the non-profit institutions

[1080] Bolivian Constitutional Tribunal, constitutional decision 0251/2012-R, Judge Rapporteur: Soraida Rosario Cháñez Chire, 29 May 2012, para III.3.
[1081] Resolución Administrativa Regulatoria AAPS 81/2012 (adopted 26 December 2012) Tarifa Solidaria a Nivel Nacional.
[1082] Resolución Administrativa Regulatoria AAPS 180/2011 (adopted 11 April 2011) Categoria social solidaria, Artículos 1, 3.

consists of a very low tariff for a minimum amount of water. This minimum amount is determined according to the number of residents living in each institution. The specific low tariff granted applies to the first 4.5 cubic metres per person per month. The excess consumption will be charged at the normal rate applicable for the institution according to the tariffs of the water provider in the area where the user is located.[1083]

A second benefit, known as the national solidarity tariff (tarifa solidaria a nivel nacional), was created by the AAPS through Administrative Resolution 81 of 2012.[1084] The solidarity tariff benefits low-income domestic users. The conditions established by the AAPS to incorporate the solidarity tariff are: a) applicable for the domestic category and for actual consumption; b) applicable for water consumption from 7.5 cubic metres up to 10 cubic metres per month; c) the price per cubic meter should be lower than the standard price established by the water provider for the domestic category; d) if the user exceeds the consumption mentioned under (b) the standard tariff for the domestic category will apply. The solidarity tariff must take into account a fixed cost that represents the administrative cost of providing the service.[1085] Utility companies located in cities with a population larger than 500.000 inhabitants needed to start applying the tariff by 1 January 2013; for utility companies located in areas with less than 500.000 inhabitants, this obligation started in July 2013. The solidarity tariff is also established with the purpose of promoting the rational use of water to a level that covers the basic human needs; this is why the social tariff only applies to a limited amount of water (between 7.5 up to 10 cubic meters).

5.3.1.4.4. Water quality

The Constitutional Tribunal has not examined cases concerning the provision of unsafe or contaminated drinking water. When the Tribunal analyses cases concerning the violation of the right to water, it frequently mentions the main elements that compose this human right, including water quality. The jurisprudence of the Constitutional Tribunal recalls General Comment 15 of the CESCR and declares that the content of the right to water is constituted by its availability, quality and accessibility. It also states that quality implies that water is free from microorganisms, chemical substances and radiological hazards that constitute a threat to a person's health. Furthermore, water should be of an acceptable colour, odour and taste for each personal or domestic use.[1086]

[1083] Resolución Administrativa Regulatoria AAPS 180/2011 (adopted 11 April 2011) Categoria social solidaria, Artículo 2.
[1084] Resolución Administrativa Regulatoria AAPS 81/2012 (adopted 26 December 2012) Tarifa solidaria a nivel nacional.
[1085] Resolución Administrativa Regulatoria AAPS 81/2012, Artículo 2.
[1086] Bolivian Constitutional Tribunal, constitutional decision 0156/2010-R, Judge Rapporteur: Ernesto Félix Mur, 17 May 2010, para III.3. Bolivian Constitutional Tribunal, constitutional decision 0122/2011-R, Judge Rapporteur: Marco Antonio Baldivieso Jinés, 21 February 2011, para III.1.2.

5.4. Independent right at the domestic level?

In South America we can observe a growing trend in the acknowledgment and protection of the right to water over the last two decades. Colombia was one of the first countries that recognised this right, through the jurisprudence of its Constitutional Court. In 1992, the Constitutional Court asserted the public services of drinking water and sanitation are essential for the right to life, the right to health and public sanitation; therefore those services constitute fundamental rights. The Constitutional Court has set forth an elaborate line of jurisprudence, fleshing out the content and elements that compose the fundamental right to water, as well as state obligations that derive from it. Due to this evolution in jurisprudence the human right to water can be considered as an independent right in Colombia.

Uruguay, Ecuador and Bolivia amended their constitutions to incorporate the fundamental right to water in 2004, 2008 and 2009 respectively. The explicit acknowledgement of the human right to water as an independent right in these countries originated as a result of the negative effects caused by the privatisation of drinking water services. Moreover, in the last decade other countries have explicitly incorporated the human right to water within their legal systems. Paraguay, Venezuela and Peru have acknowledged, between 2007 and 2009, the human right to water in their national legislation on water resources.

On the other hand, Argentina recognises the right to water by reference to the ratified international conventions on human rights, which have been granted direct application and constitutional hierarchy in its Constitution. The jurisprudence of different courts in Argentina conclude that the right to water is a derivative right that is implicit in the right to life, the right to health and the right to a healthy environment.[1087]

Chile is a rather a reluctant country regarding the recognition and implementation of the human right to water. Neither its Constitution nor its legislation acknowledges the existence of this human right. In addition, there is a conflict between the views of the two highest courts of Chile regarding the value of the rights embedded in international conventions. The Supreme Court concludes that the rights included in the international conventions on human rights ratified by Chile have constitutional rank, as they are incorporated into the Constitution by its article 5. The Constitutional Tribunal, which is in charge of the Constitutional control, denies that international conventions on human rights are at the same level of the constitution, since this would mean a modification of

[1087] See *Asociación Civil por la Igualdad y la Justicia v GCBA*, amparo action, file No. 20898/0, Court of Appeals in Administrative and Tax of the City of Buenos Aires -Sala 1., 18 July 2007; *Marchisio, Jose Bautista and others v Executive power of the municipality of Cordoba and the executive power of the Province of Cordoba*, amparo action, file No. 500003/36. First instance 8 judge in civil and comercial matters, Córdoba, 14 October 2005; *Florit, Carlos Ariel and others v Provincia de Buenos Aires and Aguas Bonaerenses S.A*, amparo action, file No. 4650, Judge Administrative, 6 July 2010.

the latter without following the required parliamentary process. Moreover, there is very limited jurisprudence on the recognition of the right to water and such judicial decisions are adopted only by two Appellate Courts. It can be inferred that the human right to water now is hardly recognised in Chile. Nevertheless, it is possible that in the near future may Chile decide to explicitly recognise this right, since there are two proposals under discussion in Congress aiming at amending the Constitution to include therein the human right to water.

In South America, the human right to water, as an independent right, has been recognised in different sources of law: constitution, national legislation and jurisprudence. In total, seven, out of the twelve states,[1088] have undoubtedly acknowledged the independent human right to water. Those countries are: Bolivia, Colombia, Ecuador, Paraguay, Peru, Uruguay and Venezuela. In addition, Argentina acknowledges the right to water as a derivative right and the Argentine province of Entre Rios incorporated the independent human right to water in its Constitution.[1089] Moreover, almost all South American states voted in favour of the UNGA Resolution 64/292 that recognises the right to safe and clean drinking water as a human right. Among them, only one country, Guyana, abstained from casting a vote. There is no information regarding the position of Suriname.[1090] Furthermore, the twelve South American states have ratified the ICESCR, the Convention on the Rights of the Child, and the Convention on the Elimination of All forms of Discrimination against Women, where access to water is included.[1091] Likewise, the Convention on the Rights of Persons with Disabilities has been ratified by almost all South American countries with the exception of Guyana, Suriname and Venezuela. No South American state has objected the recognition of the human right to water. On the contrary, states of this region have been very proactive in the acknowledgment of this right. The state practice and *opinion juris* of South American countries confirm that there is a regional recognition of the human right to water, creating in this way regional customary law[1092] which applies to a defined group of states. This human right is recognised as a derivative as well as an independent right, with a strong tendency to the latter, since the

[1088] Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay, and Venezuela. French Guyana is an oversea region of France (Article 72-3 of the French Constitution (adopted on 4 October 1958)). According to the French Constitution, Article 73, "In the overseas department and regions, laws and regulations shall be automatically applicable. They may be adapted in the light to the specific characteristics and constraints of such communities…" As a result the Code of Environment, which was modified by law 2006-1772 of 30 December 2006 and recognised the human right to water, is also applicable in French Guyana. Therefore, the direct application of the Code of Environment in French Guyana leads also to the recognition of the human right to water in this South American territory.

[1089] Constitution of the Province of Entre Ríos, Article 85.

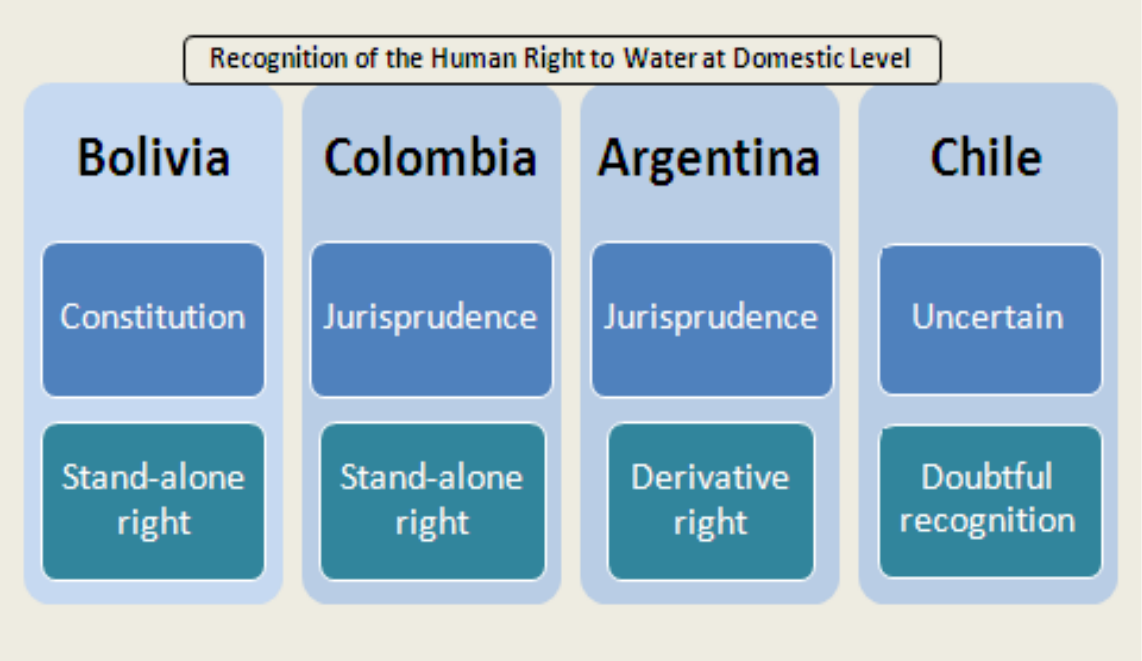
[1090] UNGA '18th Plenary meeting' (28 July 2010) UN Doc A/64/PV.108

[1091] See United Nations Treaty Collection, Chapter IV: Human Rights, <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> accessed 3 October 2013.

[1092] Malcolm N. Shaw, *International Law* (6th edn, CUP, Cambridge 2008) 92; Hugh Thirlway, 'The Source of International Law' in Malcolm D. Evans (ed), *International Law* (3rd edn OUP, Oxford 2003) 106.

majority of South American states consider the human right to water an independent right.

The following graph explains the situation regarding the recognition of the human right to water in the four countries under study. At the domestic level, countries like Argentina, Bolivia and Colombia recognise the human right to water. Nevertheless, the acknowledgment of this right varies from country to country. Colombia recognises the human right to water through the jurisprudence of its Constitutional Court, as an independent right. Bolivia explicitly incorporates this right as an independent right in its constitution. In Argentina, the human right to water is recognised by the jurisprudence of its courts as a derivative right. In contrast, Chile has not explicitly acknowledged the human right to water in its constitution or national law, but it has ratified international treaties on human rights that recognised this right. Additionally, there are only a couple of judicial decisions that consider access to drinking water to derive from the right to life. Nevertheless this recognition in practice is very limited Therefore, there is not enough evidence to conclude that Chile recognises the right to water, not even as a derivative right.



5.5. Conclusions

Regardless of the level at which human rights are recognised, whether international, regional or national, their actual implementation occurs at the domestic level. In general, human rights create obligations for states to guarantee the enjoyment of those rights. At the moment, the human right to water as an independent right is not yet

embedded in any international human rights convention. Despite the lack of an explicit recognition of the right to water at that level, different states have decided to clearly incorporate this right within their national legal orders.

In South America, different states have acknowledged and are implementing the human right to water at domestic level. Colombia was the first country that recognised the human right to water. This right was first endorsed in 1992 through the jurisprudence of its Constitutional Court, due to the unenumerated rights clause and the constitutional hierarchy given to the rights included in international human rights convention (article 93 and 94 of the Constitution). In Argentina the human right to water has been acknowledged in the jurisprudence of courts of different provinces. Similarly, the Argentine Constitution also recognises the doctrine of unenumerated right and grants constitutional hierarchy and direct application to certain international human rights conventions, which directly or indirectly incorporate the right to water. Nevertheless, the provincial courts in Argentina consider the right to water as a derivative right that is implicit in the right to life, the right to health and the right to a healthy environment.

Bolivia decided in 2009 to explicitly incorporate the human right to water in its Constitution, after the failure of the privatisation of drinking water services. Its Constitution prohibits the concession or privatisation of drinking water and sanitation services. In Chile, the recognition of the human right to water is doubtful. On the one hand, neither the Constitution nor legislation of Chile incorporates this right. On the other hand, Chile has ratified a number of international human rights conventions where access to drinking water is considered an essential element of other human rights. In addition, the Supreme Court and the Constitutional Tribunal differ on the hierarchy that such conventions should have in the national legal order. While the former grants constitutional hierarchy to the rights embedded in such conventions, the latter considers that they are not at the same level of the Constitution but below it. Moreover, the jurisprudence of the highest courts in Chile hardly ever recognised the human right to water, and the few ones that do so, acknowledge it as a derivative right. In practice, there is not a clear recognition of the human right to water as a derivative right, let alone as an independent right.

Based on the case-law of the four states under study, it can be concluded that Colombia has the most developed jurisprudence concerning the content, protection and implementation of the human right water. Even before the adoption of General Comment 15 by the CESCR, the Colombian Constitutional Court asserted that water used for human consumption is considered a fundamental right. In recent years the Constitutional Court is following international developments on this right and it has relied on General Comment 15 to determine the main elements of the human right to water. In its jurisprudence it has guaranteed physical access to water resources and water connection. It has determined that it is not unconstitutional to charge for the service of drinking water. When users are in arrears with payments for drinking water

services, water providers can suspend the supply following a specific procedure. However, when the individual in arrears does not have the economic resources to pay for the service and he/she is considered a person under special constitutional protection, then the water provider must continue supplying a minimum amount of water (50 litres per person per day) to satisfy his or her most basic human needs. The Constitutional Court has even set forth the criteria that should be taken into account to determine the amount of water that should be provided for persons deprived of their liberty. The Colombian Constitutional Court also protects the human right to water when the water that is used for human consumption does not comply with minimum quality requirements, since water should be of a quality that will not affect the health of consumers.

In Argentina the situation is different, mainly because of its administrative organisation as a federal state and the delegation of competences. Each province is in charge of the management of water resources and the provision of public services, such as drinking water. As a result, the implementation and content of the human right to water differ from province to province. For instance, there is a disparity in the legislation concerning the prohibition on completely suspending the supply of drinking water due to lack of payment. While some provinces allow suspension of the service, in other provinces a minimum amount of water must be provided even when the user is in arrears with the payment for drinking water services. Similarly, the mechanisms that exist to guarantee affordability of drinking water services also vary according to each province. Some provinces offer a great deal of protection on the human right to water, while others provide fewer mechanisms for protection.

Bolivia is the only state that explicitly recognises the human right to water in its Constitution. The Bolivian Constitutional Tribunal plays an important role in the implementation of this right. The existing legislation on water resources and drinking water supply was adopted before the constitutional reform of 2009. At this time, Bolivia is going through a transformation process to adjust its legislation to the new structure created by the Constitution of 2009. This process includes amending its legislation on water resources and drinking water supply to conform to the new provisions in the Constitution, particularly regarding the explicit recognition of the human right to water.

After analysing the legal order of Chile, particularly the Water Code and the Constitutional provision that guarantees the property right to ownership of water, it can be concluded that in effect water resources are privatised. Nevertheless, for many decades the government of Chile has been diligently working to guarantee access to drinking water to all its citizens. The recognition of the human right to water in Chile is still unclear, particularly in practice. Chilean Courts hardly ever acknowledge or implement this right. Although the government has implemented different mechanism to guarantee affordability for the supply of drinking water, the legislation allows suspending drinking water services completely when users are in arrears. Based on the

case-law, Chile does not guarantee a minimum amount of drinking water to satisfy the most basic needs of those who cannot afford such services. The existing legal order in Chile that favours privatisation of water resources has led to a lack of recognition and implementation of the human right to water. Nevertheless, this situation could change if more judicial courts recognise the human right to water as a derivative right that is embedded in different international conventions ratified by Chile or if the proposed constitutional amendments to explicitly incorporate the human right to water are approved.

It is worth mentioning that international human rights conventions and the interpretation given to those conventions by treaty bodies play an important role at the domestic level. For instance, the jurisprudence of Argentina, Bolivia and Colombia refers to General Comment 15 of the CESCR to determine the existence and the content of the human right to water.[1093] Thus, these three countries are taking into account the international developments concerning the human right to water to complement or expand the content of this right at the domestic level. It can also be concluded that most of the states that belong to the South American region have recognised the human right to water as an independent right and such recognition may continue to grow.

[1093] See *Marchisio, Jose Bautista and others v Executive power of the municipality of Cordoba and the executive power of the Province of Cordoba*, amparo action, file No. 500003/36. First instance 8 judge in civil and comercial matters, Córdoba, 14 October 2005; Bolivian Constitutional Tribunal, constitutional decision 0156/2010-R, Judge Rapporteur: Ernesto Félix Mur, 17 May 2010, para III.3; Colombian Constitutional Court, T-055 of 2011, Judge Rapporteur: Jorge Ivan Palacio Palacio, 4 February 2011.

CHAPTER VI

6. EXTRATERRITORIAL APPLICATION OF THE HUMAN RIGHT TO WATER IN A TRANSBOUNDARY WATERCOURSE CONTEXT

6.1. Introduction

Human rights create a number of state's obligations particularly towards individuals located within their territory. Additionally, it is considered that regarding economic, social and cultural rights (ESC rights) states also have obligations towards other states or individuals located outside their territories. As a result, both territorial (domestic) as well as extraterritorial obligations emerge from ESC rights. The latter obligations derived from the main duty to provide international assistance and cooperation for the full realisation of such rights. Given that the human right to water is an ESC right, extraterritorial obligations also emanate from this right.

The human right to water is a right that requires a precise element for its implementation: freshwater. However, freshwater resources are not static; they are flowing and crossing international boundaries. With approximately 300 rivers, 100 lakes and a number of aquifers shared by two or more states, [1094] international cooperation is required for the management of such resource. Likewise, freshwater resources are unevenly distributed; this situation and the relative scarcity of water resources have a direct impact on a state's capacity to realise the human right to water on its own territory. As a matter of fact, the fate of the human right to water is in many countries inextricably connected to the (in)action of other states, undermining the role of a domestic state acting alone.[1095] The difficulty to confine freshwater resources in each state marks the relevance of international cooperation and assistance for the implementation of the human right to water or the extraterritorial obligations, particularly when the realisation of this right depends on international watercourses.

International watercourses[1096] pose the problem that states can within their own borders, this means without necessarily occupying another state or without controlling individuals in another state, violate the human right to water in other riparian states, by reducing the quality or quantity of shared water resources. Therefore, it is essential that

[1094] Salman M.A. Salman, 'The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspective on International Water Law' (2007) 23 (4) Water Resource Development 638.
[1095] Takele Soboka Bulto, 'Towards Right-Duties congruence: Extraterritorial Application of The Human Right to water in the African Human Rights System', (2011) 29 (4) Netherlands Quarterly of Human Rights 497.
[1096] For the purpose of this study the following terms will be used as synonyms: International watercourse, international waters, and shared waters, which refer to transboundary waters that are shared by two or more states.

states when acting within their own territories take into account that some of their (in)actions might violate human rights of individuals located in other states.

The first part of this chapter explains the legal basis of the extraterritorial human rights obligations regarding ESC rights, and particularly the human right to water. Then, it moves on to examine the extraterritorial causes that can impact the enjoyment of the human right to water in a transboundary context. Afterwards, due to the fact that the human right to water may be implemented with transboundary waters, it examines how the use and management of international waters can affect the realisation of this right and what could be the possible solutions to that situation. This chapter also examines whether international water law can contribute to or conflicts with the realisation of the human right to water. Finally, before drawing some conclusions, we scrutinise the redress mechanisms that exist to protect the human right to water in a transboundary watercourse context.

6.2. Typology of human rights obligations at the international level

Human rights have often been considered a field where each state has mainly obligations towards its citizens or the individuals living within its territory, mainly because those obligations were devised to protect individuals from the exercise of power of their state.[1097] Therefore, human rights are framed within a territorial perspective, creating a vertical relationship (states to individuals) rather than a horizontal one between states (states-states), as is normally expected in international law.

However, it is known that states and other actors have the capacity to impact negatively or positively human rights far from home, mostly through trade and investment regimes, international aid policies, global military operations and global finance.[1098] This shows that the decisions of a state can directly or indirectly affect the human rights of individuals located in other states. These circumstances have lead individuals or groups of individuals to express their grievances against foreign states. The non-territorial state is viewed as holding direct obligations to these individuals or groups, giving rise to a diagonal relationship, which has gained some recognition within international law.[1099]

[1097] Fons Coomans and Menno T. Kamminga, 'Comparative Introductory Comments on the Extraterritorial Application of Human Rights Treaties', in Fons Coomans and Menno T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp 2004) 1.

[1098] Malcolm Langford and others, 'Introduction, An Emerging Field' in Malcolm Langford and other (eds) *Global Justice, State Duties, The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP, Cambridge 2013) 3.

[1099] Examples of this recognition are: a) accepting that international human rights standards are not are territorially limited as presume, one of the reasons being that there is not spatial limitation in some international human rights treaties such as the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights; b) the use of international court and treaty bodies to test extraterritorial claims –diagonal litigation- for instance claims submitted to regional courts for extraterritorial violations and the growing attention of UN treaty bodies in their periodic review

It was originally believed that human rights law only created obligations from states towards its citizens. When reading some of the international conventions on human rights, particularly those related to ESC rights, it is possible to see the explicit recognition of international assistance and cooperation, establishing extraterritorial (also known as international) human rights obligations as a tool to achieve the realisation of those rights.

6.2.1. Legal basis for the international human rights obligations of the economic, social and cultural rights

The concept of cooperation seems to emerge only after World War II and the idea of international cooperation, including for the purpose of promoting human rights, was for the first time embodied in the Charter of the United Nations (UN Charter).[1100] Later on other relevant international documents dealing with human rights also mention the importance of international cooperation in the realisation of human rights, *inter alia*, the UDHR and the ICESCR.

6.2.1.1. The UN Charter

The first recognition of international obligations is found in the UN Charter. The Charter mentions that international cooperation is relevant for the realisation of the purposes and principles of the Organisation. Among the purpose of the UN we found in article 1(3):

> *'[t]o achieve international co-operation in solving problems for an economic, social, cultural and humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, languages, or religion'.*[1101]

This means that states need to combine efforts or assist in promoting and respecting human rights without any distinction, everywhere. This provision calls states to collaborate among them.

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and general comments regarding extraterritorial obligations; and c) the growth in global law where the responsibility is place directly in other non-state actors and multilateral actors, such as the World Bank's Inspection Panel. Malcolm Langford and others, 'Introduction, An Emerging Field' in Malcolm Langford and other (eds) *Global Justice, State Duties, The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP, Cambridge 2013) 5.

[1100] Michał Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp 2009) 317.

[1101] Charter of the United Nations, (adopted 26 June 1945, entered into force 24 October 1945), Article 1 (3).

Additionally, under the UN Charter there are key provisions, incorporated in its Chapter IX entitled 'international economic and social cooperation', such as articles 55 and 56 that deal with international cooperation. According to article 56 member states pledge themselves to take joint and separate action in cooperation with the UN for the achievement of the purposes set forth in article 55.[1102] The latter provision establishes that:

> *'With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equitable rights and self-determination of peoples, the United Nations shall promote:*
>
> *a) Higher standards of living, full employment and conditions of economic and social progress and development;*
>
> *b) Solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and*
>
> *c) Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, languages, or religion'.*[1103]

After the adoption of the UN Charter there were some disputes concerning whether these provisions imply legal obligations or they were just hortatory or programmatic articles.[1104] Today, it seems that these provisions create legal obligation, since there is growing support that indicates that states are bound by these provisions.[1105] As Gondek pointed out, the UN Charter is a treaty and as such has binding force for its state parties.[1106] Additionally, the political and (quasi)judicial organs of the UN have

[1102] Charter of the United Nations, Article 56.
[1103] Charter of the United Nations, Article 55.
[1104] Felipe Gomez Isa, 'Transnational Obligations in the Field of Economic, Social and Cultural Rights' (2009) 18 Revista Electrónica de Estudios Internacionales 7; L. Henkin, The United Nations and Human Rights' (1965) 19 (3) International Organisation, cited in Malcolm Langford, Fons Coomans and Felipe Gomez Isa, ' Extraterritorial Duties in International Law' in Malcolm Langford and others (eds), *Global Justice, States Duties, The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP, Cambridge 2013) 54.
[1105] See Malcolm Langford, Fons Coomans and Felipe Gomez Isa, ' Extraterritorial Duties in International Law' in Malcolm Langford and others (eds), *Global Justice, States Duties, The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP, Cambridge 2013) 54; Michał Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp 2009) 317; Felipe Gomez Isa, 'Transnational Obligations in the Field of Economic, Social and Cultural Rights' (2009) 18 Revista Electrónica de Estudios Internacionales 7; Eibe H. Riedel and Jan-Michael Arend, 'Article 55(c)' in Bruno Simma and others (eds), *The Charter of the United Nations, A Commentary* (3rd edn, Volume II, OUP, Oxford 2012) 1570.
[1106] Michał Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp 2009) 317.

consistently interpreted article 55(c), as a whole to constitute legal obligations to the UN and the member states, and article 56 has been considered to constitute a duty of cooperation. [1107] The question now is how these obligations are developed. On the one hand, it is argued that article 56 would only require states to take action when the UN requests them to do so, or that states are committed to take the initiative to cooperate with the UN. [1108] On the other hand, it is argued that the duty of international cooperation in the field of human rights does not appear to be limited by the institutional confines of the UN.[1109] It can be inferred from these provisions that both the UN and its member states assume the compromise to internationally cooperate to achieve the mentioned purposes. In particular, allusion to universal respect for and observance of human rights for all without any distinction can be inferred as an obligation that all member states of the UN have towards all individuals, to at least respect their human rights without any distinction and regardless of the territory where they are located.

The first step to achieve the mentioned purposes concerning human rights was the adoption of the UDHR, which was then concretised by the adoption of the ICCPR and the ICESCR.[1110]

6.2.1.2. Universal Declaration on Human Rights

The adoption of the UDHR[1111] was the first step for the realisation of the obligations of article 55 and 56 of the UN Charter, particularly concerning the respect for, and observance of human rights and fundamental freedoms. The UDHR contains both civil and political rights as well as ESC rights. The UDHR does not limit its scope of application to any kind of territory or jurisdiction, and instead it makes reference to international cooperation in some of its provisions.

[1107] Eibe H. Riedel and Jan-Michael Arend, 'Article 55(c)' in Bruno Simma and others (eds), *The Charter of the United Nations* (3rd edn, Volume II, OUP, Oxford 2012) 1573, 1607-1608; Report of the Special Rapporteur on the Promotion of Human Rights and Fundamental Freedoms while Countering Terrorism on his Mission to the United States of America, 22 November 2007, A/HRC/6/17/Add.3, para 39; UN CESCR, General Comment 3 (1990), The nature of States parties obligations (article 2, para 1 of the Covenant), 14 December 1990, para 14.

[1108] Tobias Stoll, 'Article 56', in Bruno Simma and others (eds), *The Charter of the United Nations, A Commentary* (3rd edn, Volume II, OUP, Oxford 2012) 1604.

[1109] Malcolm Langford, Fons Coomans and Felipe Gomez Isa, ' Extraterritorial Duties in International Law' in Malcolm Langford and others (eds), *Global Justice, States Duties, The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP, Cambridge 2013) 55.

[1110] Michał Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp 2009) 319; Eibe H. Riedel and Jan-Michael Arend, 'Article 55(c)' in Bruno Simma and others (eds), *The Charter of the United Nations* (3rd edn, Volume II, OUP, Oxford 2012) 1576.

[1111] Universal Declaration of Human Rights (adopted by the United Nations General Assembly 10 December 1948, General Assembly Resolution 217 A (III)).

According to the study of the drafting process of the UDHR made by Morsink, it was considered to be desirable to insert a statement calling for the attention of ESC rights. Such a discussion led to the adoption of what are now articles 22 and 28 of the UDHR. These two provisions emerged late in the drafting process and were connected to the discussion regarding everyone's right to work and the correlative duty to fight unemployment. It was then considered that the fight against unemployment could not simply be seen as the duty of each particular country separately, but rather that it required international cooperation.[1112] Thus, it is clear that when adopting these provisions drafters were conscious about the necessity of international cooperation for the realisation of certain human rights. Nevertheless, the specific inclusion of states' obligation in the UDHR was of concern for some countries. At the end two different articles were proposed concerning ESC rights and both ended up to be adopted.

Article 22 provides that *'Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality'.*[1113]

While article 28 of the UDHR states that '[e]*veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized'.*

Article 22 was adopted as an umbrella article that introduces in general terms the ESC rights.[1114] During the drafting of this article it was mentioned that the final draft came as a result of a compromise between the views of certain governments. On the one hand the position that there should be no reference to the obligations of states in the UDHR, and the other that obligations should be spelled out in detail.[1115] It is clear from article 22 that for the realisation of the ESC rights the effort of both the territorial state and the international community are required. Additionally, a number of representatives participating in the drafting of the UDHR also considered that international cooperation was equally needed for the realisation of all rights of the UDHR, and not only for ESC rights. According to Morsink those delegations supported a more generally aim presented in article 28.[1116]

[1112] Johannes Morsink, *The Universal Declaration of Human Rights, Origins, Drafting and Intent* (University of Pennsylvania Press, Philadelphia 1999) 83-84, and 225.
[1113] Universal Declaration of Human Rights, Article 22.
[1114] Bård-Anders Andreassen, 'Article 22' in Asbjørn Eide and others (eds) *The Universal Declaration of Human Rights, A Commentary* (Scandinavian University Press, London 1992) 343 351.
[1115] Bård-Anders Andreassen, 'Article 22' in Asbjørn Eide and others (eds) *The Universal Declaration of Human Rights, A Commentary* (Scandinavian University Press, London 1992) 342-343.
[1116] Johannes Morsink, *The Universal Declaration of Human Rights, Origins, Drafting and Intent* (University of Pennsylvania Press, Philadelphia 1999) 84.

Although the UDHR does not specifically describe in detail what the obligations of states are concerning the realisation of human rights, it is clear that both national and international efforts are required for their full realisation.

6.2.1.3. International Covenant on Economic, Social and Cultural Rights

The ICESCR[1117], which came to materialise the ESC rights adopted in the UDHR also contains provisions referring to international cooperation and assistances as tools to achieving ESC rights.

The scope of application of the ICESCR is given by its article 2(1), which establishes that:

> *'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'* (underline added).

The inclusion of international cooperation with respect to ESC rights was envisaged at the early stages of the preparatory works of the ICESCR. It seems that there was consensus on the inclusion of international cooperation in Article 2(1). The reason for this inclusion was the need for states with insufficient resources to be able to obtain help under technical assistance or other ways. However, the preparative works are not clear whether states are obliged to seek (duty to) to obtain resources from wealthier states and whether wealthier states have a duty to provide such assistance.[1118] Commans and Kamminga also agree that a certain extraterritorial (in the sense of international) scope was intended by the drafters and that it is part of the Covenant. Thus, there was consequently no need to limit explicitly the protection of the rights to those people residing in the territory of a state party only.[1119]

It has been argued that the ICESCR was adopted separately from the ICCPR, its brother convention, partly because it was understood that poorer countries needed help to fulfil

[1117] Nowadays 160 states are parties to this covenant.
[1118] Michał Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp 2009) 299. See also Sigrun I. Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Intersentia, Antwerp 2006) 85.
[1119] Fons Coomans, Some Remarks in the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights, in Fons Coomans and Menno. T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp 2004) 185.

their ESC rights. Therefore, international cooperation – including technical, financial, legislative, social and cultural– is necessary.[1120]

When comparing treaties concerning civil and political rights with those regarding ESC rights we can observe one main difference. While explicit reference to territory and jurisdiction is found in the treaties concerning civil and political rights; treaties on ESC rights refer to international assistance and cooperation. When discussing extraterritorial obligations concerning treaties on civil and political rights, particularly the ICCPR and the European Convention on Human Rights, the main line of analysis focuses on whether the reference to territory and jurisdiction included in these treaties limit the scope of state obligations.[1121] Article 2(1) of the ICCPR provides that '*Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant*…' (underline added). Similarly, article 1 of the European Convention on Human Rights provides that *'[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*' (underline added). As a result, scholarship and jurisprudence on the content of extraterritorial obligations regarding civil and political rights have been overshadowed by the debate over territory and jurisdiction.[1122]

On the other hand, concerning the core international treaty on ESC rights, the ICESCR, there is no comparable reference to jurisdiction or territory. On the contrary, as we already mentioned, the ICESCR explicitly refers to international assistance and cooperation for the realisation of the rights contained therein. With regard to the interpretation of article 2(1) ICESCR, the CESCR explains the meaning of this provision in its General Comment 3. Therein, the CESCR expressed that *'in accordance with Article 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself,*

[1120] International Council on Human Rights Policy, Duties Sans Frontières: Human Rights and Global Social Justice 28 (International Council on Human Rights Policy, 2003), <http://www.ichrp.org/files/reports/43/108_report_en.pdf > accessed on 10 July 2013.

[1121] Malcolm Langford, Fons Coomans and Felipe Gomez Isa, ' Extraterritorial Duties in International Law' in Malcolm Langford and others (eds), *Global Justice, States Duties, The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP, Cambridge 2013) 51.

[1122] UN HRCom, 'General Comment 31 The Nature of the General Obligation Impose on States Parties to the Covenant', 29 March 2004, UN Doc. CCPR/C/21Rev.1/Add.13, para 10 "State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party…The enjoyment of Covenant Rights is not limited to citizens within the territory of State Parties but must also be available to all individuals, regardless of nationality of statelessness (…) who find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtain". See UN HRCom, *López Burgos v Uruguay*, Communication 52/79, UN Doc. A/36/40 <http://www1.umn.edu/humanrts/undocs/session36/12-52.htm>; Michał Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp 2009); Fons Coomans, and Menno T.Kamminga (eds) *Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp, 2004).

international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard'.[1123] The CESCR states that article 2(1) describes the nature of the general legal obligations undertaken by states parties to the Covenant.[1124] In other words, states are under the obligation to cooperate internationally for the realisation of all the rights embedded in the ICESCR. Due to this provision, international cooperation is an obligatory ingredient to the full realisation of the substantive rights incorporated in this Covenant.[1125] This duty is included in each right guaranteed in the ICESCR, including the human right to water.[1126]

The CESCR also notes that the phrase 'to the maximum of its available resources' was intended by the drafters of the Covenant to refer to both the resources existing within a state and those available from the international community through international cooperation and assistance. The CESCR also mentions that the essential role of such cooperation in facilitating the full realisation of the relevant rights is further underlined in specific provisions of the ICESCR,[1127] which are articles 11, 15[1128], 22[1129] and 23[1130].

[1123] UN CESCR, General Comment 3 (1990), The nature of States parties obligations (article 2, para 1 of the Covenant), 14 December 1990, para 14.

[1124] UN CESCR, General Comment 3 (1990), The nature of States parties obligations (article 2, para 1 of the Covenant), 14 December 1990, para 1.

[1125] Rolf. Künnemann, Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights" in Fons Coomans and Menno T. Kamminga(eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp 2004) 205.

[1126] Takele Soboka Bulto, Towards Right-Duties congruence: Extraterritorial Application of The Human Right to water in the African Human Rights System, (2011) 29(4) Netherlands Quarterly of Human Rights 512.

[1127] UN CESCR, 'General Comment 3 (1990), The nature of States parties obligations (article 2, para 1 of the Covenant)', 14 December 1990, para 13.

[1128] ICESCR, Article 15 "1. The States Parties to the present Covenant recognize the right of everyone:
(a) To take part in cultural life;
(b) To enjoy the benefits of scientific progress and its applications;
(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of *international contacts and co-operation* in the scientific and cultural fields". (Italic Added)

[1129] ICESCR, Article 22 "The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant".

[1130] ICESCR, Article 23 "The States Parties to the present Covenant agree that *international action* for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of

For the purpose of our study the most relevant provision is article 11, which provides that:

> *'1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.*
>
> *2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed... '*[1131] *(underline added).*

The word 'including', in article 11(1), indicates that this list of rights was not intended to be exhaustive. Therefore, it has been interpreted by the CESCR that the right to water falls within this list of guarantees essential for securing an adequate standard of living, particularly since water is one of the most fundamental conditions for survival.[1132]

Article 11 is one of the few provisions of the Covenant where international cooperation is mentioned again. On the basis of the preparative works of the ICESCR, Gondek concludes that it was agreed that the inclusion of international cooperation in this article was considered to be essential, since some countries, especially those which were underdeveloped, would not be able to provide their people with adequate food, clothing and shelter without international assistance.[1133]

6.2.2. Authoritative interpretation of the CESCR concerning international obligations

As mentioned before, when the CESCR interpreted the meaning of article 2(1) ICESCR, it left no doubt about the existence of states' extraterritorial obligations, since states have to provide international assistance and cooperation for the realisation of ESC rights. This obligation is stronger for those states that are in a position to assist.[1134]

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regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned". (Italic added)

[1131] ICESCR, Article 11.

[1132] UN CESCR, 'General Comment 15, the human right to water' UN Doc. E/C.12/2002/11, para 3.

[1133] Michał Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp 2009) 301.

[1134] UN CESCR, General Comment 3, The nature of States parties obligations (article 2, para 1 of the Covenant)', 14 December1990, para 14.

In the last years through the adoption of General Comments[1135], the CESCR has recognised the extraterritorial obligations of states concerning ESC rights. It is noteworthy that in the last General Comments, the CESCR has created a section on 'States Parties' Obligations' in which it includes a subsection entitled 'international obligations'.[1136] The latter refers to the obligations that all state parties to the ICESCR have towards other countries, and therefore to individuals located outside of their territory. In this way the CESCR recognises that there are state's obligations that go beyond national boundaries, so called extraterritorial or international obligations.

The CESCR has also affirmed in different General Comments that states parties should recognise the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realisation concerning the rights to adequate food, the right to work, and the right of everyone to take part in cultural life.[1137] Besides, the CESCR has used the typology of states' obligations[1138] to determine the kind of behaviour that is expected from state parties towards other states. This typology refers to the extraterritorial obligations to respect, protect and fulfil.

The international obligation to respect prohibits a state from directly interfering with the enjoyment of ESC rights of persons in other countries.[1139] It is an obligation that does not require the provision of any resource, but rather to do no harm, to refrain from.[1140] The international obligation to protect means to take measures in order to prevent violations of the rights of people situated outside state territory by third parties, such as international organisations and transnational companies.[1141] The international obligation

[1135] General Comments are not legally binding. However, they are soft law instrument that interpret and add detail to the rights and obligations contained in the respective human rights treaty. Helen Keller an Leena Grover, 'General Comment of the Human Rights Committee and Their Legitimacy' in Helen Keller and Geir Ilfstein (eds) *UN Human Rights Treaty Bodies, Law and Legitimacy* (CUP, Cambridge 2012) 129.

[1136] UN CESCR, 'General Comment 14, the right to health' (2000), UN Doc. E/C.12/2000/4; UN CESCR, General Comment 15, the human right to water', UN Doc. E/C.12/2002/11; UN CESCR, 'General Comment 18, the right to work' (2005), UN Doc. E/C/12/GC/18; and UN CESCR, 'General Comment 21, the right to everyone to take part in cultural life' (2009), UN Doc. E/C.12/GC/21.

[1137] See UN CESCR, 'General Comment 14 the right to health' (2000), UN Doc. E/C.12/2000/4, para 38; UN CESCR, 'General Comment 18, the right to work' (2005), UN Doc. E/C/12/GC/18, para 29; and UN CESCR, 'General Comment 21, the right to everyone to take part in cultural life' (2009), UN Doc. E/C.12/GC/21, para 58.

[1138] Eide on its studies in the right to food used a particular classification to clarify the nature and levels of states obligations regarding economic and social rights. This framework is based on three levers: the obligation to respect, the obligation to protect and the obligation to fulfil. This typology is widely used. Asbjørn Eide, 'The Right to Adequate Food and to be From Hunger, Updated Study on the Right to Food, Submitted by Mr. Asbjørn Eide in Accordance with Sub-Commission decision 1998/106' UN Doc. E/CN.4/Sub.2/1999/12, para 52.

[1139] Fons Coomans, 'Some remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights', in Fons Coomans and Menno T. Kamminga (eds) *Extraterritorial Application on Human Rights Treaties* (Intersentia, Antwerp 2004) 192.

[1140] Michał Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp 2009) 347.

[1141] Michał Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp 2009) 347.

to fulfil refers to the positive obligation of states to contribute to the realisation of the ESC rights in other countries. It could mean the direct provision of the right to the persons deprived of it, or to set the conditions in which it would be possible to achieve the rights.[1142] This typology of international obligations has been included in the last general comments indicating the kind of behaviour that is expected in a international context in relation to the right to food, the right to health, the right to work, and the right to water.[1143]

In 2002, the CESCR adopted General Comment 15 to outline and determine the normative content of the human right to water as well as states' obligations. As part of the latter, the CESCR uses the typology of states obligations (respect, protect, fulfil) to incorporate specific extraterritorial duties under the section of international obligations. In the next section we will examine the international obligations of the human right to water according to the interpretation of the CESCR.

6.2.2.1. International obligation to respect

The obligation to respect means that the state must abstain from doing anything that violates the rights of individuals. The state is duty bound to respect individuals' human rights and not to interfere or deprive them of rights that they are already enjoying.[1144] This obligation requires that state parties refrain from interfering directly or indirectly with the enjoyment of the right to water.[1145]

The international obligation to respect refers to the behaviour of state parties within their own territory that can have effects in other states. According to Skogly, this obligation implies that a state's action should not impair human rights already enjoyed by individuals in other states. Concerning the international obligation to respect and particularly in relation to the right to water, the CECSR affirms that *'[t]o comply with the international obligations in relation to the right to water, States parties have to respect the enjoyment of the right in other countries. International cooperation requires States Parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Any activities undertaken within the*

[1142] Michał Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp 2009) 348; Fons Coomans, 'Some remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights', in Fons Coomans and Menno T. Kamminga (eds), Extraterritorial Application on Human Rights Treaties (Intersentia, Antwerp 2004) 195.
[1143] UN CESCR, 'General Comment 12, the right to adequate food' (1999), UN Doc. E/C.12/1999/5, para 36; UN CESCR, 'General Comment 14, the right to health' (2000), UN Doc. E/C.12/2000/4, para 39; UN CESCR, 'General Comment 15, the right to water' (2002), UN Doc. E/C.12/2002/11.
[1144] Sigrun I. Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Intersentia, Antwerp 2006) 67.
[1145] UN CESCR, General Comment 15, the right to water' (2002), UN Doc. E/C.12/2002/11, para 21.

State party's jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction'.[1146]

Herein the CESCR recognises that activities undertaken by one state, within its jurisdiction, can considerably affect the enjoyment of the right to water in other states. This is why the CESCR explicitly mentions that any activity carried out within the state party's jurisdiction, thus neither occupying another state nor controlling individuals in another state, should not deprive another country of the ability to realise the right to water for persons in its jurisdiction. From the wording used in the General Comment 15, '*states have to respect'* it can be inferred that for the CESCR states are under a clear obligation to refrain from infringing the human right to water.

In General Comment 15, the CESCR gives examples of the international obligation to respect. For instance, states parties should refrain from preventing the supply of water, as well as goods and services essential for securing the right to water. Likewise, water should not be used as an instrument of political and economic pressure.[1147] It should also be added to this list that state parties should refrain from unlawfully diminishing or polluting international watercourses. For instance, in a context of transboundary or international waters, it is expected that states agree on water quality standards as well as allocation of such resource. In this event, when states are using shared waters within its own territory they have to refrain from actions that will infringe the enjoyment of the right to water in other countries connected to the same watercourse.

6.2.2.2. International obligation to protect

The obligation to protect requires states to prevent third parties, also known as non-state actors (individuals, groups, citizens, and other entities), from interfering in any way with the enjoyment of human rights. This obligation includes, inter alia, adopting the necessary legislative measures to restrain, for example, third parties from polluting and inequitably extracting from water resources, wells and other water distribution systems, or denying equal access to adequate water.[1148]

The international obligation to protect requires that the state takes the necessary measures to prevent that non-state actors violate human rights in other countries. The prevention is often achieved through legislation. Regarding this obligations the CESCR affirms that *'[s]teps should be taken by States parties to prevent their own citizens and companies from violating the right to water to individuals and communities in other countries'*.[1149] The extraterritorial obligation to protect implies an obligation upon states to regulate the activities of non-state actors over whom they have jurisdiction or control, to ensure that they do not infringe on individuals' rights in other countries in which they

[1146] UN CESCR, General Comment 15, the right to water' (2002), UN Doc. E/C.12/2002/11, para 31.
[1147] UN CESCR, General Comment 15, the right to water' (2002), UN Doc. E/C.12/2002/11, para 32.
[1148] UN CESCR, General Comment 15, the right to water' (2002), UN Doc. E/C.12/2002/11, para 23.
[1149] UN CESCR, General Comment 15, the right to water' (2002), UN Doc. E/C.12/2002/11, para 33.

may operate.[1150] States needs to ensure that for instance companies under their jurisdiction operating in other states do not violate the human right to water in the latter. Likewise, based on the obligation to protect the state is under the obligation to ensure that the activities of non-state actors acting or operating within its territory, do not infringe the rights of individuals located in other countries.

General Comment 15 also affirms that '*[w]here States parties can take steps to influence other third parties to respect the right [to water], through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law'*.[1151] It can be inferred that the scope of the obligation might apply also to actors that are not within a state's jurisdiction, for instance international organisations.[1152]

6.2.2.3. International obligation to fulfil

The obligation to fulfil is the most controversial of the three types of states' obligations, as it may be seen to indicate that states have a positive obligation to contribute in the realisation of human rights in other countries.[1153] It is argued that the obligation to fulfil arises when the measures taken to respect and protect human rights are not sufficient to ensure that individuals enjoy those rights.[1154] From the obligation to fulfil, subcategories of obligations have been developed, which are: the obligation to facilitate, provide and promote. These subcategories represent the different ways in which the obligation to fulfil can be realised.[1155]

Concerning the obligation to fulfil the CESCR emphasises that *'[d]epending on the availability of resources, states should facilitate realization of the right to water in other countries, for example through provision of water resources, financial and technical assistance, and provide the necessary aid when required. International assistance should be provided in a manner that is consistent with the Covenant and other human rights standards, and sustainable and culturally appropriate. The*

[1150] Sigrun I. Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Intersentia, Antwerp 2006) 70.
[1151]UN CESCR, 'General Comment 15, the right to water' (2002), UN Doc. E/C.12/2002/11, para 33.
[1152] Ashfaq Khalfan, 'Division of Responsibility Among States' in Malcolm Langford and others (eds), *Global Justice, State Duties, the Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP, Cambridge 2013) 309.
[1153] Sigrun I. Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Intersentia, Antwerp 2006) 71; Fons Coomans, 'Some Remarks on the extraterritorial application of the international Covenant on Economic, Social and Cultural Rights' in Fons Coomans and Menno T. Kamminga (eds), *Extraterritorial application of Human Rights Treaties* (Intersentia, Antwerp 2004) 195.
[1154] Sigrun I. Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Intersentia, Antwerp 2006) 71.
[1155] Michał Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp 2009) 62; Ashfaq Khalfan, 'Division of Responsibility Among States' in Malcolm Langford and others (eds), *Global Justice, State Duties, the Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP, Cambridge 2013) 316.

economically developed states parties have a special responsibility and interest to assist the poorer developing states in this regard'.[1156]

Regarding the obligation to fulfil it must be said that there is no legally binding obligation upon a state to provide any particular form of assistance to any specific other state. A state normally has significant discretion to determine where to target the benefit of its extraterritorial obligation to fulfil.[1157] Additionally, this obligation is limited to states in a position to assist, therefore is formulated as an obligation that supplements the territorial obligation to fulfil.[1158] It is yet unknown when this international obligation starts, and how much is expected from the territorial states and the international community.[1159] The extraterritorial obligation to fulfil depends on the availability of resources, which are not limited to financial ones. For instance, General Comment 15 also refers to the availability of the water itself. It explicitly states that a way of facilitating the realisation of the right to water is through the provision of water resources. In a transboundary river states have available water resources that should be distributed among them to guarantee the realisation of the human right to water for their populations. In this case, if states distribute the water of an international watercourse in a way that all the population dependent on that watercourse, regardless of the riparian state where they are located, can have access to enough water to satisfy their human right, then states will be complying with the obligation to fulfil since they facilitated the conditions to realise this right. In this example, we are not strictly speaking of the provision or transfer of water, but simply about an equitable distribution of a shared resource.

Scholars argued that international obligations are always complementary to domestic state obligations, but they do not have a secondary or subsidiary character. International obligations to respect and protect apply simultaneously with the obligation of the domestic state. Only the international obligation to fulfil is to be considered subsidiary, because it applies if the domestic state is unable to fulfil ESC rights by itself.[1160]

[1156] UN CESCR, 'General Comment 15, the right to water' (2002), UN Doc. E/C.12/2002/11, para 34.
[1157] Ashfaq Khalfan, 'Division of Responsibility amongst States' in Malcolm Langford and others (eds), *Global Justice, State Duties, The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP, Cambridge 2013) 321.
[1158] Ashfaq Khalfan, 'Division of Responsibility amongst States' in Malcolm Langford and others (eds), *Global Justice, State Duties, The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP, Cambridge 2013) 331.
[1159] Rolf. Künnemann, 'Extraterritorial application of the international Covenant on Economic, Social and Cultural Rights', in Fons Coomans and Menno T. Kamminga (eds), *Extraterritorial application of Human Rights Treaties* (Intersentia, Antwerp 2004) 224.
[1160] Wouter Vandenhole, 'EU and Development: Extraterritorial Obligations under the International Covenant on Economic, Social and Cultural Rights', in Margot E. Salomon, Arne Tostensen and Wouter. Vandenhole (eds), *Casting the Net Wider: Human Rights, Development and New Duty-Bearers* (Intersentia, Antwerp 2007) 87.

6.3. The human right to water in a transboundary watercourse context

It is widely accepted, at least regarding civil and political rights, that states can be, and have been, held responsible for violations of human rights caused outside their territory mainly when they exercised effective control over a foreign territory (e.g. military occupation) or over persons located in foreign territory.[1161] These scenarios denote the extraterritorial application of human rights obligations. However, due to the particularities of the human right to water, i.e. that freshwater is the essential element to realise this right, extraterritorial violations of the right to water may not always fall under these circumstances. In fact, the use and management given to watercourses at the national level may have an impact in other states that share the same watercourse. In other words, a state can within the boundaries of its territory cause harm or a violation of the right to water to individuals located in a co-riparian state.

Freshwater resources are finite, irreplaceable, and in many cases shared between two or more states. There are different actions that can infringe the enjoyment of the human right to water extraterritorially. However, this study only examines the main causes that can negatively affect the human right to water in a transboundary water context. This section focuses on the extraterritorial impacts on the human right to water from a water management perspective and analyses whether the universal rules of water law can contribute to or conflicts with the realisation of the human right to water. Finally, judicial and non-judicial mechanisms that might exist to protect the human right to water in a transboundary watercourse context are examined.

6.3.1. Extraterritorial causes that impact the human right to water

Freshwater resources are not static. They are flowing and crossing international boundaries. There are approximately 300 rivers, 100 lakes and a number of aquifers shared by two or more states.[1162] Additionally, freshwater resources are unevenly distributed; therefore, requiring international cooperation. This situation and the relative scarcity of water resources have a direct impact on a state's capacity to realise the human right to water in its own territory. As a matter of fact, the fate of the human right to water is in many countries inextricably connected to the (in)action of other states, undermining the role of a domestic state acting alone. For instance, in Egypt the

[1161] Coomans, F. and Kamminga, M.T., 'Comparative Introductory Comments on the Extraterritorial Application of Human Rights Treaties', in F. Coomans and M. T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp 2004) 3-4, 43; Talele Soboka Bulto, 'Extraterritorial Application of the Human Right to Water in the African Human Rights System', (2011) 29 (4) Netherlands Quarterly of Human Rights 499. See also Michał Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp 2009).

[1162] Salman M.A. Salman, 'The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspective on International Water Law' (2007) 23 (4) Water Resource Development 638.

realisation of the human right to water and other human activities completely rely on the waters of the Nile River, which is shared and crossed other nine states before reaching Egypt.[1163]

International watercourses[1164] pose the problem that states can within their own borders reduce the quality or quantity of shared water resources and violate the human right to water in other riparian states, without necessarily occupying another state or without controlling individuals in another state.

Water uses such as agriculture, energy production, industry, and human consumption, have continued growing requiring larger quantities of freshwater. If a state does not sufficiently consider the uses of other riparian states in the management and use of transboundary waters, it is likely that such use and management end up negatively impacting the realisation of the human right to water of the population dependent on international watercourses in those other states. An upstream state can considerably reduce the flow of a shared river, or contaminate its waters, for instance by building a dam, disposing of wastewater without treatment, or over-exploiting the resource. These actions create a difficult situation for downstream states, since they are confronted with polluted water that cannot be used or a diminished water quantity that is insufficient to satisfy the basic needs of the entire population dependent on the transboundary watercourse. The mentioned actions taken by an upstream state are executed within its territory, but their consequences may affect the human right to water for individuals located in a downstream state. An over utilisation or pollution by a riparian state of a shared water would inevitably affect the capacity of other riparian state(s) to control and use its share of the waters for the realisation of the human right to water within its territory.[1165] Therefore, it is essential that states when acting within their own territories take into account that some of their (in)actions might violate the human rights of individuals located in other states.

Similarly, political, economic and military pressure, from a downstream and more developed state could also prevent upstream states from initiating new water uses, such as the provision of drinking water for its growing population or its economic development. For instance, Egypt and Sudan (downstream states) threatened war should Ethiopia (upstream state) interfere with the flow of the Nile. In fact, Egypt succeeded for many years in exploiting its greater political importance to block international

[1163] Takele Soboka Bulto, 'Towards Right-Duties congruence: Extraterritorial Application of The Human Right to water in the African Human Rights System' (2011) 29 (4) Netherlands Quarterly of Human Rights 497.
[1164] For the purpose of this study the following terms will be used as synonyms: International watercourse, international waters, and shared waters, which refer to transboundary waters that are shared by two or more states.
[1165] Takele Soboka Bulto, 'Towards Right-Duties congruence: Extraterritorial Application of The Human Right to water in the African Human Rights System' (2011) 29 (4) Netherlands Quarterly of Human Rights 496.

financing of Ethiopian dams and related works.[1166] International cooperation in the management and use of water is necessary to satisfy the needs of all states sharing international waters. This cooperation should be even greater now that there is a growing concern about water scarcity.[1167] International water law aims to regulate the use and management of those international shared watercourses, establishing the main rules for such cooperation.

6.3.2. International water law as the legal framework for cooperation in the management and use of transboundary water

Nowadays, the main universal convention that represent the core rules of international water law is the Convention on the Law of the Non-navigational Uses of International Watercourses (the UN Watercourse Convention)[1168], adopted by the UN General Assembly. Equally the Berlin Rules,[1169] adopted in 2004 by of the International Law Association (ILA) in Berlin and drafted by the Water Resource Committee of the ILA, incorporate the core principles of international water law.

The core rules of international water law are centred in three principles: the principle of reasonable and equitable utilisation, the no significant harm rule and the obligation to cooperate.

6.3.2.1. Principle of equitable and reasonable utilisation of waters

The principle of equitable and reasonable utilisation means that states sharing international watercourses shall manage those transboundary basins in an equitable and reasonable manner. In particular, states must develop and use the international watercourse in order to attain the optimal and sustainable use thereof and benefits from, taking into account the interest of the other watercourse states, consistent with adequate

[1166] Joseph W. Dellapenna, 'Rivers as Legal Structures: The Examples of the Jordan and the Nile', (1996) 36 Natural Resource Journal 247.

[1167] The United Nations, The United Nations Programme of Action from Rio, "Agenda 21" (1992). Chapter 18, para 18.3; European Environment Agency. "Water Resource Across Europe- Confronting Water Scarcity and Drought" EEA Report No 2/2009, 11<http://www.eea.europa.eu/publications/water-resources-across-europe> accessed 21 August 2013; Ana Cascão, Andres Järgerskog and Anton Earle, "Transboundary Water Cooperation: A Rubik's Cube", in A Jägerskog, T.j. Clausen, and K. Lexén (eds), *Cooperation for a Water Wise World* (Report 32, Partnership for Sustainable Development, SIWI, Stockholm 2013) 37 <http://www.hydrology.nl/images/docs/alg/WWWeek2013/2013_WWW_Report_web.pdf> accessed on 28 August 2013.

[1168] Convention on the Law of the Non-navigational Uses of International Watercourses (UN Watercourse Convention), (adopted on 21 May 1997, not yet in force since not enough parties have ratified or accepted such a Convention) GA Resolution 51/229.

[1169] International Law Association (ILA), Water Resource Committee, 'Berlin Conference (2004) Water Resources law' (adopted on 21 August 2004) <http://www.ila-hq.org/en/committees/index.cfm/cid/32> accessed 10 July 2013. The Berlin Rules are the result of revising and updating the Helsinki Rules according the current state of art of customary international water law.

protection of the waters.[1170] It is noteworthy to mention that equitable does not mean equal. It refers to equity that means a fair share considering the water needs and the ability to use the water efficiently by the several riparian states.[1171]

When determining an equitable and reasonable use of international waters a number of factors must be taken into account. When there is a conflict of uses in an international watercourse, the equitable and reasonable use of water resources must be determined through the balancing and consideration of all relevant factors in each particular case. [1172] The UN Watercourse Convention includes the following relevant factors, which are not limited to: 'a) geographic, hydrographic, hydrologic, hydrogeological, climatic, ecological and other natural features; b) the social and economic needs of the watercourse states concerned; c) the population dependent on the watercourse in each watercourse state; d) the effects of the use or uses of the waters of the watercourse in one watercourse state on other watercourse states; e) existing and potential uses of the watercourse; f) conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to achieve that effect; and g) the availability of alternatives, of comparable value, to the particular planned or existing use'.[1173] The Berlin Rules incorporate the same abovementioned factors, but include two more: 'h) the sustainability of proposed or existing uses; and i) the minimization of environmental harm'.[1174]

All the above mentioned factors are to be considered together to determine what equitable and reasonable utilisation is.[1175] The weight of each factor is to be determined by its importance in comparison with other relevant factors. Although, as a general rule, it is considered that no single factor or circumstance is per definition more important than any of the others,[1176] there is only one exception: water used for vital human needs. The UN Watercourse Convention establishes, in its article 10, that in the event of a conflict between uses of an international watercourse, it shall be resolved with reference to the principle of reasonable and equitable utilisation, with special regards being given to the requirements of vital human needs. [1177] The Berlin Rules go ahead and

[1170] UN Watercourse Convention, Article 5; Berlin Rules, Article 12.
[1171] Joseph W. Dellapenna, 'The Customary International Law of Transboundary Fresh Water' (2001) 1 (3/4) International Journal Global Environmental Issues 286.
[1172] UN Watercourse Convention, Article 6(1)(3).
[1173] UN Watercourse Convention, Articles 6.
[1174] Berlin Rules, Article 13.
[1175] Berlin Rules, article 13; UN Watercourse Convention, Article 6. One of the difference between these two instruments is that while the Berlin Rules refers to 'drainage basin', which means an area determined by the geographic limits of a systems of interconnected waters, the surface waters of which normally share a common terminus; while the UN Watercourse Convention refers to 'watercourse', which means a system of surface waters and ground waters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus.
[1176] Marjon Kroes. "The Protection of International Watercourses as Sources of Fresh Water in the Interest of Future Generations" in Edwards H.P Brans and others (eds), *The Scarcity of Water Emerging Legal and Policy Responses* (Kluwer Law International, The Hague 1997) 85.
[1177] UN Watercourse Convention, Article 10.

unmistakably prioritise the use of water for vital human needs among other uses. In this respect the Berlin Rules provide that in determining an equitable and reasonable use, state must first allocate waters to satisfy vital human needs, given to only this use priority among others.[1178]

The UN Watercourse Convention does not incorporate a definition of vital human needs. However, this definition has been interpreted as '*in determining these needs, special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation*'.[1179] It can be inferred from this definition that the water supplied to sustain human life covers the normal uses for which drinking water is provided, which includes, drinking, cooking, and personal household and hygiene. Additionally, water should be sufficient for the production of the necessary food to survive to prevent starvation. On the other hand, the Berlin Rules define vital human needs as the '*waters used for immediate human survival, including drinking, cooking, and sanitary needs, as well as water needed for the immediate sustenance of a household'*.[1180] Water uses for immediate human survival are not limited to the ones mentioned here, since the word 'including' indicates that the listed uses are not exhaustive and additional uses can fall within this definition. Vital human needs also cover the use of water necessary for the sustenance of a household, which clearly refers to the water necessary for the provision of food for the family.[1181] Although, these definitions are written in two different ways, they are comparable. Both indicate that when determining the amount of water required for satisfying vital human needs, uses such as drinking, cooking, personal and household hygiene, and even food production for survival have to be taken into account. It should be noted that these definitions mirror the uses that the human right to water wants to ensure to individuals, and are in line with General Comment 15. The latter establishes that priority in the allocation of water must be given to the right to water for personal and domestic uses, as well as water required to prevent starvation and diseases.[1182] According to Bulto, article 10(2) of the UN Watercourse Convention, which give priority to vital human needs over other uses, has a special normative utility and can be considered as a legal basis of the human right to water.[1183]

[1178] Berlin Rules, Article 14.
[1179] Report of the Sixth Committee convening as the Working Group of the Whole, Convention on the Law of the Non-Navigational Uses of International Watercourse, 11 April 1997, UN Doc. A/51/869, para 8 <http://www.un.org/law/cod/watere.htm> accessed on 20 August 2013.
[1180] Berlin Rules, Article 3 (20)
[1181] The commentary of the Berlin Rules indicates that water uses necessary for the immediate sustenance of a household are for instace watering livestock for household use and keeping a kitchen garden. However, using water for commercial irrigation, mining, manufacturing, power generation or for recreation is not included in this concept of vital human needs. Berlin Rules, commentary of Article 3.
[1182] UN CESCR, 'General Comment 15, the right to water' (2002), UN Doc. E/C.12/2002/11, para 6.
[1183] Takele Soboka Bulto, *The Extraterritorial Application of the Human Right to Water in Africa* (CUP, Cambridge 2014) 53-54.

The Berlin Rules go further and include among its provisions the right to water, even though it does not explicitly use the words 'human right'. Article 17 of the Berlin Rules incorporates 'the right of access to water', which provides that *'[e]very individual has a right to access to sufficient, safe, acceptable, physically accessible, and affordable water to meet that individual's vital human needs*'. It also establishes that states must ensure the implementation of this right on a non-discriminatory basis.[1184] Furthermore, article 17 uses the typology of human rights obligations to determine the duties that states must undertake to progressively realise the right of access to water. Although, article 17 does not explicitly use the words obligations to respect, protect and fulfil, this provision adopts the tripartite typology of obligations employed by the CESCR. According to article 17 of the Berlin Rules

> '*States shall progressively realize the right of access to water by*
>
> *a) Refraining from interfering directly or indirectly with the enjoyment of the right;*
>
> *b) Preventing third parties from interfering with the enjoyment of the right;*
>
> *c) Taking measures to facilitate individuals access to water, such as defining and enforcing appropriate legal rights to access to and use of water; and*
>
> *d) Providing water or the means for obtaining water when individuals are unable, through reasons beyond their control, to access water through their own efforts*'.[1185]

Since the Berlin Rules are regulating the management of international water; it can be inferred that the right of access to water incorporated in these Rules also has an international character. The 'Usage Note' of the Berlin Rules, the guidelines on how to read these rules, establishes that 'most of the Rules contained therein are applicable to all waters - meaning surface waters and groundwater other than marine waters - regardless of whether the waters in question are found in an international drainage basin. The Rules in Chapter IV, IX, and X for the most part apply only to the waters of international drainage basins'.[1186] This means that all the Rules included in those Chapters apply to international water and some may also apply to national waters. As a matter of fact, article 17 is included within Chapter IV. It would be logical to understand that this article is one of the provisions that not only apply to waters of international drainage basins but also to national water,[1187] because it grants a right to

[1184] Berlin Rules, article 17 (1) and (2).
[1185] Berlin Rules, Article 17.
[1186] Berlin Rules, Usage Note.
[1187] It is also worth noting that a number of the Berlin Rules are applicable to the management of all waters, both national and international. This is indeed a major deviation by the ILA from its entire previous work that dealth exclusively with international rivers, international drainage basins and

individuals. Additionally, the Usage Note explicitly affirms that the Rules that apply to all waters are expressed in terms of 'States', while Rules that specifically apply to the waters of international drainage basins are expressed in terms of 'basin States'. Article 17 of the Berlin Rules refers to 'States'. Thus, confirming our interpretation that this provision applies to both national and international waters. Moreover, there is no reference whatsoever in the Berlin Rules, neither the Usage Note nor in the commentary regarding the application of this Rule (article 17) or any other Rule solely to national water.[1188] As a result, it can be concluded that article 17 is applicable to both national and international waters; thus opening the door for the recognition of extraterritorial obligations concerning the right of access to water.

The Committee on Water Resources Law of the ILA asserted that the Berlin Rules *'represent a major development of the rules relating to water resource, integrating the traditional rules regarding transboundary waters with rules derived from the customary international environmental law and international human rights law that apply to all waters, national as well as international'*.[1189] It should be noted that among the sources that support the incorporation of the right of access to water (article 17 of the Berlin Rules), the Committee on Water Resources Law included articles 11 and 12 of the ICESCR. If the Committee on Water Resources Law considers that the right of access to water is recognised in these provisions, then it is clear that the Committee on Water Resources agrees with the interpretation of the CESCR regarding the implicit incorporation of the right to water in the ICESCR, as stated in General Comment 15. Based on the wording used in article 17, there is no doubt that the Committee on Water Resources Law followed General Comment 15 and took on some of its main elements. Firstly, as it was previously shown, the definition of the right of access to water is almost identical as the definition of the right to water provided in General Comment 15. Secondly, the state's obligations that derived from the right to water are also spelled out in article 17 paragraph 3 of the Berlin Rules. We can infer that article 17 is an unequivocal recognition of the human right to water in the field of international water law.

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transboundary groundwater. Salman M.A. Salman, 'The Helsinki Rules, the UN Watercoursese Convention and the Berlin Rules: Perspective on International Water law', (2007) 23 (4) Water Resource Development 635, 368.

[1188] Much of the chapters dealing with all waters (national and international) either are new or are significantly different from the content of the *Helsinki Rules* and the *UN Convention*, both of which restricted their coverage solely to international waters. Chapter IV deals with the rights of persons, including the right of access to water, the right to participate decisions and to the necessary information, rights of persons organized as communities. (…)Some of the new articles are firmly grounded in international human rights law, and are beyond question. Joseph W. Dellapenna, 'The Berlin Rules on Water Resources: A New Paradigm for International Water Law' the 13th IWRA world Water Congress, , 1-4 September (2008) <http://www.iwra.org/congress/2008/index.php?page=proceedings&abstract_id=568> accessed 20 October 2013.

[1189] International Law Association (ILA), Water Resource Committee, 'Berlin Conference (2004) Water Resources law' 2 <http://www.ila-hq.org/en/committees/index.cfm/cid/32> accessed 10 July 2013.

Additionally, if most of the Berlin Rules apply to all waters (national and international), Chapter IV for the most part apply only to international drainage basins, Article 17 applies to both national and international waters, and there are no provisions in these Rules that solely apply to national waters, then it can be inferred that the state's obligations provided for the realisation of the right of access to water also have a national and international character. In other words article 17 creates states' obligations towards individuals located within their jurisdiction as well as towards other states. Moreover, the fact that the Committee on Water Resource Law adopts the state's obligations described in General Comment 15 is an indication that it agrees with the CESCR regarding the duties that derived from this right, which are both territorial and extraterritorial. As a result, the typology of obligations adopted in article 17 as the duties that states must assume for the progressive realisation of the right of access to water undeniably have an international connotation creating obligations between states and leading also to the recognition of the international (extraterritorial) obligation of the human right to water, as interpreted by the CESCR. In any case, if the intention of the Committee on Water Resources Law would not have been to include international state's obligations concerning the right of access to water, it would have clearly stated the exclusive application of this right to national water. However, there is no evidence that this article or any other provision of the Berlin Rules is pertinent only to national waters or the territory of each state.[1190]

6.3.2.2. The no significant harm rule

This principle proclaims that when using, managing, allocating or protecting water resources, states shall refrain from and prevent acts or omissions within their territory that can cause significant harm to other states, having due regard for the right to each basin state to make equitable and reasonable use of the waters.[1191] It is understood that this provision has its roots in the general principal 'not to use your property so as to injure the property of another'.[1192]

This principle is not, and has never been, conceived as absolutely prohibiting the causing of harm under all circumstances. Quite the contrary, this principle reveals itself as one that requires avoidance of harm in a way and to an extend that is reasonable under the circumstances.[1193] In principle, causing significant transboundary harm is

[1190] Bourquain affirms that during the negotiations of the UN Watercourse Convention states were unwilling to subject confined water bodies to international water law and there is no indication for a considerable changed state practice subsequent to its adoption. Knut Bourquain, *Freshwater Access from a Human Rights Perspective: A Challenge to International Water and Human Rights Law* (Martinus Nijhoff Publishers, Leiden 2008) 47.
[1191] UN Watercourse Convention, Article 7; Berlin Rules, Article 16.
[1192] Peter H. Gleick, 'Water and Conflict: Fresh Water Resource and International Security', (1993) 18 (1) (summer) International Security 107.
[1193] Stephen C. McCaffrey, *The Law of International Watercourses* (2nd edn, OUP, Oxford 2007) 407.

unlawful, unless due diligence has been exercised. However, a watercourse utilisation which continues to cause significant transboundary harm over an extended period of time, notwithstanding the exercise of due diligence, could become inequitable and unreasonable. Adjustment or compensation may therefore be necessary to keep the watercourse utilisation in the longer term equitable and reasonable.[1194]

There has been discussions about the relationship between the principle of equitable and reasonable utilisation and the principle of not causing significant harm to other states, particularly where these two principles appear to conflict. The discussion focuses on which principle is more relevant or prevails. According to Louka, while the principle of equitable utilisation favours upstream users, since it stresses equity considerations that put past and future uses on the same level; the principle of prevention of significant harm favours downstream users, since it is usually demanded by them that infrastructural development and other uses of the upstream do not undermine their use of water resources.[1195]

The relationship between these principles differs between the UN Watercourse Convention and the Berlin Rules. It is argued that the UN Watercourse Convention subordinate the obligation not to cause harm to the principle of equitable and reasonable utilisation.[1196] According to the provision of the UN Watercourse Convention it has been understood that the no significant harm principle plays a complementary and supportive role to the principle of equitable utilisation.[1197] Thus, the principle of no-harm (article 7) in the UN Watercourse Convention is considered to be subordinated to the principle of equitable utilisation (article 5).[1198] Article 7 of the UN Watercourse Convention provides that states shall take all appropriate measure to prevent the causing of significant harm to other watercourse states, and where harm is caused it shall take all the appropriate measures, having due regard for the provisions of articles 5 and 6, in consultation with the affected states to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.[1199] Since articles 5 and 6 refers to

[1194] Marjon Kroes, 'The Protection of International Watercourse as Sources of Fresh Water in the Interest of Future Generation' in Edward H.P. Brans and others (eds) *The Scarcity of Water, Emerging Legal and Policy Responses* (Kluwer Law International, The Hague 1997) 87 to 90. See also UN Watercourse Convention, Article 7(2).

[1195] Elli Louka, *International Environmental Law, Fairness, Effectiveness and World Order* (CUP, Cambridge 2006) 173.

[1196] Joseph W Dellapenna, 'The Customary International Law of Transboundary Fresh Waters' (2001) 1 (3/4) International Journal of Global Environmental Issues 285.

[1197] Stephen C. McCaffrey, *The Law of International Watercourses* (2 edn, OUP, Oxford 2007) 408.

[1198] Elli Louka, *International Environmental Law, Fairness, Effectiveness and World Order* (CUP, Cambridge 2006) 174; Joseph W Dellapenna, 'The Customary International Law of Transboundary Fresh Waters' (2001) 1 (3/4) International Journal of Global Environmental Issues 285; see also Peter H. Gleick, 'Water and Conflict, Fresh Water Resource and International Security', (1993) 18 (1) (summer) International Security 107; Marjon Kroes, 'The Protection of International Watercourse as Sources of Fresh Water in the Interest of Future Generation', in Edward H.P. Brans and others (eds) *The Scarcity of Water, Emerging Legal and Policy Responses* (Kluwer Law International, the Hague1997) 90.See UN Watercourse Convention, Article 7(2).

[1199] UN Watercourse Convention, Article 7.

the principle of equitable and reasonable utilisation and the relevant factors and circumstances necessary to determine it, it is considered that the principle of no harm is subjected to the principle of equitable and reasonable utilisation.

On the other hand, and trying to resolve this debate about the relevance of the mentioned principles, the Berlin Rules subjected each principle to the other in order to present the two principles as equal.[1200] Article 16 of the Berlin Rules provides that *'Basin States, in managing the waters of an international drainage basin, shall refrain from and prevent acts or omissions within their territories that cause significant harm to another basin State having due regard for the right to each basin State to make equitable and reasonable use of the water'.*

Concerning the meaning of significant harm, it should be mentioned that no definition is found either in international instruments or in the literature.[1201] Neither significant harm is described or restricted to certain particular damage. Therefore, 'harm' should be understood in a broad manner. As a result, significant harm can be understood as environmental damage in general, pollution, negative impact in water resources, restriction in state water uses, negative impact on human health, among others. According to the UN Watercourse Convention and the Berlin Rules the only limitation established is that the harm is caused in the management or utilisation of international waters.

As mentioned before, this principle is not a prohibition of all harm; but, only of significant harm. The International Law Commission (ILC) states that *'[t]he harm must be capable of being established by objective evidence. There must be a real impairment of use, i.e. a detrimental impact of some consequences upon, for example, public health, industry, property, agriculture or the environment in the affected State'.*[1202] It can be said that if the utilisation or management of international waters done by one state causes a detrimental impact in the realisation of the human right to water to individuals in other riparian state, which may lead to problems of public health, to the extent that it can be established objectively by evidence, there is significant harm. According to Bourquain the principle of no-harm provides for a minimum standard of protection; otherwise this obligation would lose its meaning if it did not even prevent the severest harm to occur, in particular to life and health. An utilisation that causes water scarcity among people setting their basic amount of water for survival at threat is render perse unlawful by the UN Watercourse Convention.[1203]

[1200] Salman M. A Salman, 'The Helsinki Rules, the UN Watercourse Convention and the Berlin Rules: Perspective on International Water Law' (2007) 23 (4) Water Resource Development 637.

[1201] Stephen C. McCaffrey, *The Law of International Watercourses* (2nd edn, OUP, Oxford 2007) 409.

[1202] International Law Commission (ILC), 'Report of the Commission to the General Assembly in the Work of its Fortieth Session' (9 May -29 July 1988) UN Doc. A/43/10, 36 <http://legal.un.org/ilc/documentation/english/A_43_10.pdf> accessed 31 July 2013.

[1203] Knut Bourquain, *Freshwater Access from a Human Rights Perspective: A Challenge to International Water and Human Rights Law* (Martinus Nijhoff Publisher, Leiden 2008) 39.

Moreover, if the no significant harm rule is considered to be subjected or complementary to the principle of equitable and reasonable utilisation, and according to the latter vital human needs prevail among other uses, the fact that this use is negatively affected by other uses of international waters in other riparian state(s), should be considered as being in non-compliance with the principle of reasonable and equitable utilisation. In other words, other uses should not be considered to be equitable and reasonable if they negatively affect or significantly harm the satisfaction of vital human needs of people dependent on the concerned international watercourse.

Furthermore, the International Law Commission (ILC) asserts that the obligation not to cause harm not only extend to the utilisation of international waters by the states themself. In addition, the riparian states '*are also obligated not to permit private entities operating in their territories to utilize the watercourse 'in such a way as to cause appreciable harm to other watercourse states''*.[1204] From this principle, not to cause significant harm two obligations derive. The first one requests states to refrain from causing harm in the utilisation of international waters. The second obligation request states to prevent that others (private entities) cause harm when operating in international waters.

The principle of no significant harm applies in two directions, meaning that neither upstream states nor downstream state should cause harm to each other. It is well accepted that an upstream user can harm a downstream user, for instance by polluting or reducing the quantity of water. On the other hand, downstream intensive use of water sources may constrain the scope of subsequent new uses for upstream users, affecting the balance of equitable use. These kinds of disputes are not uncommon since downstream states tend to develop their water resources earlier than their upstream neighbours for different reasons.[1205] As MacCaffrey explains, considering that the principle of no harm rule applies only to upstream users could lead to a situation in which the later-developing upstream sate found itself unable to make significant use of the portion of the international watercourse within its territory because doing so would be likely to interfere with established uses in its downstream neighbour, causing significant harm to that state in violation of the rule. In this case, the extensive development of water resources in a downstream state would have the effect of foreclosing, or at least limiting, future uses in an upstream state.[1206] In other words, downstream development or old existing uses cannot entirely prevent the upstream state's realisation of its equitable share and therefore its development.

[1204] ILC, 'Report of the Commission to the General Assembly in the Work of its Fortieth Session' (9 May -29 July 1988) UN Doc. A/43/10, 36.
[1205] Stephen C. McCaffrey, *The Law of International Watercourses* (2nd edn, OUP, Oxford 2007) 407, 410, 412; Joseph W. Dellapenna, 'The Customary International Law of Transboundary Fresh Waters; (2001) 1 (3/4) International Journal of Global Environmental Issues 280.
[1206] C. McCaffrey, *The Law of International Watercourses* (2nd edn, OUP, Oxford 2007) 411.

6.3.2.3. The obligation to cooperate

In both the UN Watercourse Convention and the Berlin Rules the obligation to cooperate is present.[1207] This obligation indicates that states must cooperate in good faith in the management of water resources for optimal and mutual benefits.[1208]

The Commentary of the Berlin Rules explains that *'[t]he duty to cooperate ultimately arises because without cooperation between basin states, it is literally impossible for states to fulfil their obligation to share transboundary water resources, to achieve sustainable development, to protect ecological integrity, and to fulfil the many other legal obligation expressed in these Rules'*.[1209] The obligation to cooperate is also related to the obligation to exchange data and information, to consult each other and to notify about planned measures that may have a significant adverse effect upon other riparian states, as well as to protect and preserve ecosystems of international watercourses.[1210]

Additionally, cooperation is mentioned as part of the implementation of the principle of equitable and reasonable utilisation. Riparian states must participate in the use, development and protection of international watercourses and such participation includes the duty to cooperate in the protection and development thereof.[1211] Moreover, in determining what an equitable and reasonable utilisation is and when necessary states must enter into consultations in a spirit of cooperation.[1212]

6.3.3. Are international obligations on the human right to water conflicting with the principles of international water law?

Based on the international obligations that derive from the human right to water (see section 6.2) states have certain duties towards other states or individuals located in other countries. As a result, states must refrain from directly or indirectly interfering with the enjoyment of the human right to water. Any activity undertaken within a state jurisdiction should not deprive another country of the ability to realise the human right to water for persons in its jurisdiction. For instance, states should refrain from preventing the supply of water, or contaminating the water to a level that makes it unusable for other countries. States are also obliged to prevent third parties from interfering in any way with the enjoyment of the human right to water in other countries. The best manner to do so is by adopting the necessary legislative measures and ensuring its compliance. States should regulate, inter alia, allocation and extraction of water resources, discharge of wastewater, and pollution. Additionally, states should facilitate

[1207] UN Watercourse Convention, Article 8; Berlin Rules, Article 11.
[1208] UN Watercourse Convention, Article 8; Berlin Rules, Article 11.
[1209] International Law Association, 'Berlin Conference (2004) forth report', Commentary Article 14, p. 20.
[1210] UN Watercourse Convention, Articles 9, 11, 12,20; Berlin Rules, Articles 56 to 67
[1211] UN Watercourse Convention, Article 5.
[1212] UN Watercourse Convention, Article 6.

realisation of the right to water in other countries, since the international obligations that derive from ESC rights apply to all states parties to the ICESCR.

The extraterritorial causes that might impact the enjoyment of the right to water, particularly in the use and management of international watercourses, can be prevented or controlled if states comply with the main principles of international water law and the international obligations that derive from the human right to water. By giving priority to vital human needs, the principle of reasonable and equitable utilisation requests states to equitably allocate water to satisfy the needs of the population dependent on a concerned international watercourse. While ensuring the satisfaction of vital human needs, the human right to water would be also guaranteed, since the former mirrors the basic human needs that the latter is aiming at protecting. Moreover, the principle of equitable and reasonable utilisation can be connected with the international obligation to fulfil. According to this international obligation, states should facilitate the realisation of the right to water in other countries. However, this obligation depends on the availability of resources, which can be financial, technical or natural resources. Additionally, the international obligation to fulfil is particularly incumbent on those states which are in a position to assist.[1213] It is clear that states sharing an international watercourse are in such a position. Therefore, states should cooperate with each other in the adequate management of shared resources to guarantee the right to water to the dependent population located in all riparian states sharing the same watercourse. In the case of transboundary watercourse, the obligation to fulfil (facilitate) can be complied by facilitating, in other words setting up the conditions to equitably distributing the water of a shared watercourse among the riparian states, satisfying the basic human needs of the entire population dependent on that shared watercourse. Vice versa the principle of reasonable and equitable utilisation is of direct relevance for the implementation of the human right to water, since it compels all co-riparian states to cater the needs of their respective population in their water-sharing agreements, as well as to ensure that all the population of a shared watercourse that are dependent on common waters are treated equally.[1214] It can be seen that the principle of equitable and reasonable utilisation and the international obligation to fulfil can be interlinked.

Te principle of no significant harm is interconnected with the international human rights obligations to respect and protect. The obligation not to cause significant harm is subdivided in two duties requesting states, first to refrain from causing harm in the utilisation of international waters, which entails due diligence. And second to prevent that third parties under its jurisdiction cause harm when operating in international

[1213] UN CESCR, 'General Comment 3 (1990), The nature of States parties obligations (article 2, para 1 of the Covenant)', 14 December 1990, para 14; Ashfaq Khalfan, 'Division of Responsibility amongst States' in Malcolm Langford and others (eds), *Global Justice, State Duties, The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP, Cambridge 2013) 331.
[1214] Takele Soboka Bulto, *The Extraterritorial Application of the Human Right to Water in Africa* (CUP, Cambridge 2014) 201.

waters. The obligation to respect requires states to refrain from actions that interfere with the human right to water in other states. It entails a negative obligation of abstention from interference, which corresponds to the minimum standard of 'do not harm'.[1215] Thus, the obligation to respect is comparable with the first duty that derives from the no significant harm rule. The second duty that derives from the no significant harm rule correlates with the obligation to protect, since these obligations require states to prevent third parties under its jurisdiction operating in international waters from violating the human right to water in other states.[1216]

In this way, if the principles of international water law and/or the international obligations of the human right to water are complied with in a context of transboundary watercourses, the measures taken by each state to ensure the implementation of the right to water or satisfy vital human needs to its inhabitants would not be undermined by the action of the other riparian state(s) of the concerned shared waters. In addition, based on the correlation that exists between such international obligations and the principles of water law, it can be concluded that these two legal frameworks are interlinked.

The obligation to cooperate that exists in international water law correlates with the international cooperation and assistance that should be provided for the progressive realisation of ESC rights. The CESCR has asserted that states should ensure that the right to water is given due attention in international agreements and, to that end, should consider the development of further legal instruments. States should take steps to ensure that these instruments do not adversely impact upon the right to water.[1217] This means that when states agree upon the management of international watercourses the human right to water must be taken into account. The main difference that exists between these two kinds of cooperation is that in the field of international water law this obligation is limited to the riparian states connected to a particular international watercourse. In contrast, international cooperation in the field of human rights is broader, since it is addressed to all states parties to the ICESCR without considerations of proximity or geographical/hydrological connection. Moreover, the obligation to cooperate in international water law refers to the management and utilisation of water resources; the exchange of information concerning international waters; the notification of planned measures, programmes, projects or activities; and the solution of conflicts connected with the shared resource. In contrast, the international cooperation based on human rights is wider; it is not only related to transboundary rivers and can be provided

[1215] Water Vandenhole and Wolfgang Benedek, 'Extraterritorial Human Rights Obligations and the North-South Divide, in Malcolm Langford and others (eds), *Global Justice, State Duties, The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP, Cambridge 2013) 336.
[1216] UN CESCR, General Comment 15, the right to water' (2002), UN Doc. E/C.12/2002/11, para 33; Michał Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp 2009) 357; Takele Soboka Bulto, *The Extraterritorial Application of the Human Right to Water in Africa* (CUP, Cambridge 2014) 208.
[1217] UN CESCR, 'General Comment 15, the right to water' (2002), UN Doc. E/C.12/2002/11, para 35.

through economic and technical assistance, among other mechanisms.[1218] In this field of law the definition of international assistance and cooperation is not restricted; on the contrary it refers to a wide range of joint activities that can include the cooperative management of shared water resources.[1219]

Two particular cases will be used to illustrate that the principles of international water law can contribute in the realisation of the human right to water in a context where international waters are involved. The first case concerns the transboundary watercourses of the Colorado River, located in the western side of the border between the United States of America and Mexico. Although in the management of the concerned watercourse, the human right to water has not been explicitly taken into account, the different agreements adopted, according to international water law, for the adequate management of transboundary watercourse between these two states serve to protect such a right.

To solve some of the problems on boundary and water allocation regarding the intense and competitive use of the Colorado and Rio Grande Rivers, the United States and Mexico agreed on a Treaty for the Utilisation of the Waters of the Colorado and Tijuana Rivers and the Rio Grande in 1944, which entered into force in November 1944. The treaty placed the functions of implementation and enforcement of the treaty in the International Boundary and Water Commission (IBWC).[1220] The treaty allocated a specific annual quantity of water that each country should deliver to the other, and it even allows for temporal exemption, when due to extraordinary drought or a serious accident each state cannot deliver the required amounts of water.[1221] However, the treaty does not mention anything regarding the quality of the water that should be delivered.

In early 1960's there were complaints from the Mexican side regarding the high salinity of the Colorado River, which compromised its use. The salinity occurs naturally in the Colorado River but it was increased due to municipal industrial uses, out-of basin transfers and saline irrigation return flows. As a result, the salinity levels increased dramatically over the years, making the water not usable for drinking or irrigation.[1222] According to the principles of international water law, it can be said that United States was causing a significant harm to Mexico by delivering water of very low quality that

[1218] ICESCR, Article 2.
[1219] Christina Leb, *Cooperation in the Law of Transboundary Water Resources* (CUP, Cambridge 2013) 218.
[1220] Allie Alexis Umoff, 'An Analysis of the 1944 U.S-Mexico Water Treaty: Its Past, Present and Future', (2008) 32 Environs Environmental Law and Policy Journal 71.
[1221] Allie Alexis Umoff, 'An Analysis of the 1944 U.S-Mexico Water Treaty: Its Past, Present and Future', (2008) 32 Environs Environmental Law and Policy Journal 75; Treaty for the Utilisation of Waters of the Colorado and Tijuana Rivers and of the Rio Grande (adopted on 3 February 1944, entered into force 8 November 1945), Articles 4 and 10.
[1222] Margaret B. LaBianca, 'Growing Water Demand Brings Interest Together for the Yuma Desalting Plant Pilot Run' (2010) 12 (2) ABA Water Resources Committee Newsletter 22; Allie Alexis Umoff, 'An Analysis of the 1944 U.S-Mexico Water Treaty: Its Past, Present and Future', (2008) 32 Environs Environmental Law and Policy Journal 78.

makes it unusable. At the same time, it could be inferred that the United States was infringing its international obligation to respect and protect that derive from the human right to water, since the United States was preventing the realisation of such a right by delivering unusable water; thus, depriving Mexican individuals to use the delivered water to satisfy vital human needs. A study made in 1961 revealed that salinity was indeed threatening drinking water supply since for instance, the salinity level in the city of Mexicali was greatly exceeding the salinity limit used at that time by the WHO to determine potability.[1223]

In relation to this situation there were two controversial positions. On the one hand, it was understood that the United States had promised to Mexico certain quantity of water but not usable water. It was also considered that Mexico could not complain about the quality of the water it received because it had been granted more water under the treaty than it deserved. On the other hand, it was considered that the 1944 treaty recognised Mexico's past, present and anticipated future of the Colorado water for irrigation and domestic drinking water supply, and that the treaty itself noted that water was needed by Mexico for domestic, agricultural and livestock use. Thus, Mexico's position was that if poor quality rendered the water provided by the United States unfit for these purposes, then deliveries of such water were inconsistent with the treaty.[1224]

After long negotiations, in 1973 the United States agreed to control the salinity of the water delivered to Mexico. The IBWC adopted Minute 242 on the 'Permanent and Definitive Solution to the International Problem of the Salinity of the Colorado River', which limited the annual average salinity levels of the Colorado waters delivered to Mexico.[1225] This Minute places the financial burden of cleaning the Colorado River on the United States, the country responsible for damaging the quality in the first place. This negotiation agreement illustrates how the principle of cooperation was applied in this case, were dialogue, exchange of information and negotiations between these two riparian states finally led to an agreement that solved the problem. Additionally, the United States adopted new legislation and programmes, such as the 1974 Colorado River Basin Salinity Control Act - Public law 93-320, which authorised the construction, operation and maintenance of works in the Colorado River basin to control the salinity of the water delivered to Mexico. Also the Colorado River Water Quality Improvement Program was adopted to ensure the good quality of the water along the river basin, including the water that was delivered to Mexico. As a result, a number of projects and

[1223] The level of salinity was 2,500 parts per million (ppm), which great exceeded the 1,500 ppm allowed by the WHO. Paul Stanton Kibel and Jonathan R. Schutz, 'The Rio Grande Designs: Texans' NAFTA Water Claim Against Mexico', (2007) 25 (2) Berkeley Journal of International Law

[1224] Paul Stanton Kibel and Jonathan R. Schutz, 'The Rio Grande Designs: Texans' NAFTA Water Claim Against Mexico', (2007) 25 (2) Berkeley Journal of International Law 108.

[1225] Margaret B. LaBianca, 'Growing Water Demand Brings Interest Together for the Yuma Desalting Plant Pilot Run' (2010) 12 (2) ABA Water Resources Committee Newsletter 23; Allie Alexis Umoff, 'An Analysis of the 1944 U.S-Mexico Water Treaty: Its Past, Present and Future', (2008) 32 Environs Environmental Law and Policy Journal 80.

programmes were initiated to decrease the salinity of the Colorado River basin including irrigation scheduling and farm management. The adopted legislation and the respective measures necessary to ensure compliance represent some of the mechanisms that the state needed to take on to ensure that neither the state itself nor third parties, such as irrigators in this case, continue to contravene the no significant harm rule. One can say that when the United States controlled the actions of private persons that were contributing to the salinity of the water and delivered water of good quality, the United States stopped causing a significant harm and extraterritorially affecting the realisation of the human right to water. In fact, by adopting the Minute 242 and the national legislation, which guarantee the good quality of the water, the United States is also complying with its international obligation to fulfil, since the United States is setting up adequate conditions for an equitable use of the shared waters ensuring its good quality. Consequently, facilitating the satisfaction of vital human needs of the population dependent on the Colorado River, and therefore contributing in the realisation of the human right to water for those individuals.

International water law can contribute to the human right to water even if states sharing an international watercourse do not recognise the human right to water and its international obligations, or states are not parties to the ICESCR. Due to the interconnection that exists between these two fields, by applying the main principles of international water law in the management of an international watercourse states will be likely to comply too with the international obligations of the human right to water. Therefore, avoiding that their (in)action may extraterritorially affect the human right to water in other riparian states sharing the same watercourse. In the mentioned example, the United States is not a party to the ICESCR and does not recognise the human right to water as a justiciable right within its jurisdiction.[1226] As a result, the United States does not consider itself to be bound by the international obligations that derive from this right. Nevertheless, when properly applying the principles of international water law on the management of the Colorado River, the United States is allowing that the population dependent on the Colorado River located in Mexico can also satisfy their vital human needs, which reflects on the capacity of the domestic state (Mexico) to realise the human right to water in its territory with international waters.

On the other hand, when states acknowledge the human right to water a number of obligations (national and international) emerge for them, regardless of whether they are riparian states of transboundary watercourses. The scope of application of human rights obligations is broader than the one of international water law. The international human rights obligations (respect, protect and fulfil) on the right to water establish the duties that states need to comply within their territory or jurisdiction to avoid the violation of

[1226] "The Right to safe drinking water and sanitation is not one that is protected in our Constitution, nor is it justiciable as such in U.S. courts, though varios U.S. laws protect citizens from contaminated water". General Assembly of the OAS, Resolution The Human Right to Safe Drinking Water and Sanitation (adopted on 5 June 2012) AG/RES.2760 (XLII-0/12), footnote from the delegation of the United States.

such a right in other states. These duties could be implemented through the management of a transboundary river, to refrain from and prevent interference with the enjoyment of the human right to water in an extraterritorial watercourse context, even if states are reluctant to apply the principles of international water law.

The second case refers to the Nile River, which is situated in the east of Africa in one of the continents where most of the water-limited states are located.[1227] The Nile River basin is shared by eleven countries: Burundi, Democratic Republic of Congo, Egypt, Eritrea, Ethiopia, Kenya, Rwanda, Sudan, South Sudan, Tanzania and Uganda.[1228] These states are highly dependent on the waters of the Nile; but Egypt is completely dependent on this water, for all human activities it relies on the Nile River.[1229] Ninety-seven percent of Egypt's water comes from the Nile River, and more than ninety-five percent of the Nile's runoff originates outside of Egypt.[1230] Conflicts over allocation, use, development and protection of the Nile River have remained the sore point in the region for decades.[1231] After the British gained effective control of Egypt in 1882, they also succeeded in securing control over nearly the whole of the Nile Valley. The British obtained control over the headwater in Kenya, Uganda and Tanzania. The British also reached an agreement, with the Congo Free State (control by Belgium), Ethiopia, and Italy (the other states controlling various sources of the Nile) not to change the flow of the waters of the Nile without British consent.[1232] After the independence of Egypt, the British and the Egyptian government agreed in 1929 the British control of Sudan with Sudan's water needs to be subordinated to Egypt's water needs.[1233] Then, in 1959 an Agreement for the Full Utilisation of the Nile was made between Sudan and Egypt, due to the persisted demand of various Sudanese politicians claiming the modification of the 1929 Agreement.[1234] According to the Agreement for the Full Utilisation of the Nile, given the calculated yearly discharge of 84 billion cubic meter of water at Aswan, Egypt and Sudan obtained the right to use respectively, 55.5 billion and 18.5 billion cubic metres, with the remaining 10 billion earmarked to cover losses from annual

[1227] Peter H. Gleick, 'Water and Conflicts: Fresh Water Resources and International Security' (1993) 18 (1) International Security 102.
[1228] Musa Mohammed Abseno, 'Nile River Basin' in Flabia Rocha Loures and Alister Riew-Clarke (eds), *The UN Watercourse Convention in Force: Strengthening International Law for Transboundary Water Management* (Earthscan from Routledge, London 2013) 140-141.
[1229] Takele soboka Bulto, 'Towards Rights-Duties Congruence: Extraterritorial Application of the Human right to Water in the African Human Rights System (2011) 29 (4) Netherlands Quarterly of Human Rights 497.
[1230] Peter H. Gleick, 'Water and Conflicts: Fresh Water Resources and International Security' (1993) 18 (1) International Security 86.
[1231] Elli Louka, *International Environmental Law: Fairness, Effectiveness, and World Order* (CUP, Cambridge 2006) 197.
[1232] Joseph W Dellapenna, 'Rivers as Legal Structures: The Examples of the Jordan and the Nile', (1996) 36 Natural Resource Journal 239.
[1233] Joseph W Dellapenna, 'Rivers as Legal Structures: The Examples of the Jordan and the Nile', (1996) 36 Natural Resource Journal 241.
[1234] Yacob Arsano, 'Negotiations for a Nile-Cooperative Framework Agreement' (2011) Institute for Security Studies 3 <http://www.issafrica.org/publications/papers/negotiations-for-a-nile-cooperative-framework-agreement> accessed 20 October 2013.

evaporation and seepage.[1235] No proportion of the waters of the Nile was legally recognised for the use and ownership of the other upstream countries in which all the waters of the Nile arise.[1236] Ethiopia rejected the negotiations and even the United Kingdom, at that time the colonial ruler over Kenya, Tanzania and Uganda, complained about the Egyptian-Sudanese bilateral agreement. Once these countries achieved independence they also decisively rejected all Nile agreements to which they had not been party and any other agreements or understanding that were prejudicial to their sovereign rights and national interest.[1237]

The bilateral agreements of 1929 and 1959, as well as other agreements limit water development in upstream states since these could reduce the supply available to Egypt, increasing tension in this arid region. Egypt has the stronger military position in the area and has manifested its willingness to intervene with force to prevent any disruption of water flow.[1238] Egypt based its position on the no harm rule and an absolute right to the integrity of the river because of the priority of its use.[1239] According to the absolute right to the integrity of the river the lower riparian state is entitled to demand continuation of the natural flow of water from the territory of the upper riparian.[1240] The question that is increasingly being posed is whether Egypt can continue using large quantities of water for agriculture when the needs of other upstream countries are growing.[1241] This way of managing the Nile River is not in line with the principles of international water law, particularly since cooperation and the principle of equitable and reasonable utilisation are not taken into account, and the no harm is only employed to protect downstream states. Egypt forgets that the no significant harm rule applies to both downstream and upstream states. This management negatively impacts upstream states, especially since they are starting to realise about their need to increase water use due to their growing population. At the Nile basin level, the current population that is dependent on this water is estimated at more than 300 million, number that is expected

[1235] Ashok Swain, 'Ethiopia, The Sudan and Egypt: The Nile River Dispute', (1997) 35 (4) The Journal of Modern African Studies 679; Elli Louka, *International Environmental Law: Fairness, Effectiveness, and World Order* (CUP, Cambridge 2006) 197.
[1236] Yacob Arsano, 'Negotiations for a Nile-Cooperative Framework Agreement' (2011) Institute for Security Studies 3.
[1237] Elli Louka, *International Environmental Law: Fairness, Effectiveness, and World Order* (CUP, Cambridge 2006) 196; Yacob Arsano, 'Negotiations for a Nile-Cooperative Framework Agreement' (2011) Institute for Security Studies 3-4.
[1238] Peter H. Gleick, 'Water and Conflicts: Fresh Water Resources and International Security' (1993) 18 (1) International Security 86.
[1239] Joseph W Dellapenna, 'Rivers as Legal Structures: The Examples of the Jordan and the Nile', (1996) 36 Natural Resource Journal 247.
[1240] Aysegül Kibaroğlu, *Building a Regime for the Water of the Euphrates-Tigris River Basin* (Kluwer Law International, Netherlands 2002) 123.
[1241] Ashok Swain, 'Ethiopia, The Sudan and Egypt: The Nile River Dispute', (1997) 35 (4) The Journal of Modern African Studies 686-687.

to double to 600 million in the next 25 years.[1242] If the needs of the entire population dependent on the waters of the Nile are not taken into account, as oppose to only the needs of downstream users, this situation will end up affecting the satisfaction of vital human needs of the population located in upstream states, and therefore, their human right to water.

Seeking for some cooperation, a number of initiatives have been established with the participation of a large number of Nile basin states.[1243] At the end of the 1990's, negotiations started among Nile basin countries to change the management of the Nile River for a more cooperative agreement, putting in the agenda the issue of equitable allocation of the Nile waters.[1244] After prolong negotiations involving all the riparian countries of the Nile, except Eritrea, the Cooperative Framework Agreement (CFA) was adopted. The CFA was opened for signature on 14 May 2010 and has been signed by Rwanda, Tanzania, Uganda, Kenya, Burundi and Ethiopia.[1245] The CFA applies to the use, development, protection, conservation and management of the Nile River Basin and its resources, and establishes an institutional mechanism for cooperation among the Nile Basin states.[1246] The CFA is based, among others, on the principles of cooperation, sustainable development, prevention of causing significant harm, and the principle of equitable and reasonable utilisation. However, it does not mention that priority should be given to vital human needs.[1247] A particular point of discussion and a reason for Egypt and Sudan for not signing this agreement refers to the inclusion of water security. The CFA defines water security as the right of all Nile Basin States to reliable access to and use of the Nile River system for health, agriculture, livelihoods, production and environment.[1248] Then article 14 CFA stipulates that having due regard to the principle of equitable and reasonable utilisation and the obligation not to cause significant harm

[1242] Musa Mohammed Abseno, 'Nile River Basin' in Flabia Rocha Loures and Alister Riew-Clarke (eds), The UN Watercourse Convention in Force: Strengthening International Law for Transboundary Water Management (Eaterhscan from Routledge, London 2013) 142.
[1243] Some of the initiatives are Undugu and Tecconile. Undugu, project based on an annual ministerial meeting to discuss issues of the Nile water such as agriculture and resource development and the promotion of economic, technical and scientific cooperation among the riparians. Tecconile is a Technical Cooperation Committee for the Promotion of the Development and Environmental Proection of the Nile established in 1992. Dereje Zeleke Mekonnen, 'The Nile Basin Cooperative Framework Agreement Negotiations and the Adoption of a 'Water Security' Paradigm: Flight into Obscurity or a Logical Cul-de-sac?' (2010) 21 (2) European Journal of International Law 426.
[1244] Dereje Zeleke Mekonnen, 'The Nile Basin Cooperative Framework Agreement Negotiations and the Adoption of a 'Water Security' Paradigm: Flight into Obscurity or a Logical Cul-de-sac?' (2010) 21 (2) European Journal of International Law 427.
[1245] Musa Mohammed Abseno, 'Nile River Basin' in Flabia Rocha Loures and Alister Riew-Clarke (eds), *The UN Watercourse Convention in Force: Strengthening International Law for Transboundary Water Management* (Earthscan from Routledge, London 2013) 147. Ethiopia ratified the CFA in June 2013. --, 'Ethiopia ratifies River Nile Treaty amid Egypt tensions', *BBC News Africa* (13 June 2013) <http://www.bbc.co.uk/news/world-africa-22894294> accessed 5 January 2013.
[1246] Agreement on the Nile River Basin Cooperative Framework (not yet into force), Article 1 <http://www.internationalwaterlaw.org/documents/regionaldocs/Nile_River_Basin_Cooperative_Framework_2010.pdf> accessed 10 December 2013.
[1247] Agreement on the Nile River Basin Cooperative Framework, Articles 3 and 4.
[1248] Agreement on the Nile River Basin Cooperative Framework, Article 2(f).

the Nile basin states recognise the vital importance of water security to each of them. Paragraph (b) of article 14 is the point of disagreement. The version agreed by all states except Egypt and Sudan reads: Nile Basin states agree *'not to significantly affect the water security of any other Nile Basin State*'. The counterproposal from Egypt and Sudan reads: '*not to adversely affect the water security and current uses and rights of any other Nile Basin States'*.[1249] This disagreement shows that the situation on the Nile River has not greatly changed. Downstream states insist on maintaining their historical and natural rights on the basis of colonial and unilateral agreements; while upstream countries are looking for a more cooperative management and assert their sovereign right to utilise and develop the water resources as the waters emanate from their territories and flow through their territorial jurisdiction.[1250] The inclusion of water security as part of the CFA indicates that each of the Nile riparian states has the right of access to water for different uses including health and livelihood, for the subsistence and well-being of their own population, which can be translated in the satisfaction of water basic needs. Nevertheless, if the counterproposal of Egypt and Sudan is accepted this will risk the satisfaction of vital human needs and the human right to water for the upstream population dependent of the Nile River. Because Egypt and Sudan are the current biggest users of the Nile River and believe they have an absolute right to the integrity of the river. Therefore, this provision means that upstream states are able to use the waters of the Nile as long as they do not affect current uses and rights, which will be translated in the inability of these states to increase the use of the waters of the Nile Rivers to satisfy the needs of their growing populations, thus affecting the realisation of the human right to water of upstream users. In fact, this situation will be contrary to the main principles of international water law: equitable and reasonable utilisation and the no significant harm rule, which have been incorporated into the CFA. Moreover, if upstream states have sufficient water resources to satisfy the human right to water of their population, but instead of using it for this purpose they agree to let the water flow so downstream states use it for agricultural development among other uses, this agreement would imply a violation of the ICESCR, to which they are a party.[1251] Furthermore, there will be non-compliance with the international obligations of the right to water that establishes that states should ensure that the right to water is given due attention in international agreements.[1252]

The Nile River basin is a special case where cooperation among riparian states is extremely necessary, more than in any other transboundary river, due to the scarcity of

[1249] Agreement on the Nile River Basin Cooperative Framework, Annex on Article 14(b) to be resolved by the Nile River Basin Commission within six months of its establishment.
[1250] Yacob Arsano, 'Negotiations for a Nile-Cooperative Framework Agreement' (2011) Institute for Security Studies 1.
[1251] The following Nile Basin states are a party to the ICESCR: Burundi (9 May 1990), Democratic Republic of Congo (1 November 1976), Egypt (14 January 1982), Eritrea (17 April 2001), Ethiopia (21 October 1991), Kenya (1 May 1972), Rwanda (16 April 1975), Sudan (18 March 1986) and Uganda (21 January 1987).
[1252] UN CESCR 'General Comment 15, the right to water' (2002) UN Doc. E/C.12/2002/11, para 35.

water in the region and the growing population dependent on this resource. The case of the Nile River basin also shows that the principles of international water law provide the most adequate and equitable use of transboundary water for all riparian states concerned, and contribute to the protection of the human right to water, when this right is guaranteed with international waters.

The principles of international water law can definitely play an important role to the implementation of the human right to water for the population dependent on international watercourses. Similarly, the international obligation on the human right to water can be considered as the general guidelines that states need to take into account when managing transboundary watercourses. As a result, these obligations and principles are interlinked. The following graph illustrates the interconnection that exists between the principles of international water law and the international obligations that derive from the human right to water.

6.3.4. Remedies

This section scrutinises whether there are mechanisms, judicial or not, to seek redress when states have extraterritorially violated the human right to water. This section examines what remedies may be available in the fields of international human rights law and international water law that enable states and individuals to initiate a claim against

another state. The claim should arise as a result of an extraterritorial infringement on the human right to water, caused in the use and management of a transboundary watercourse. The available mechanisms for states and individuals are examined separately.

6.3.4.1. Mechanisms used by states

Both human rights law and international water law provide a number of mechanisms, judicial and non-judicial, that can be used to obtain redress when a right has been violated or to solve water disputes. These mechanisms are analysed according to each field of law.

A) Inter-state mechanisms in international water law

International water law offers different mechanisms that can be used to solve a dispute over international waters, such as: 1) a particular dispute settlement mechanism agreed between states; 2) negotiations; 3) good offices of a third party; 4) arbitration; and 5) recourse to the International Court of Justice (ICJ).

According to international water law, in absence of an applicable agreement that determines how to solve a water dispute between the states concerned, states need to seek for other peaceful dispute settlement mechanisms. The first step that states should take to solve a water dispute is to inform and consult each other to reach an agreement by negotiation. If the dispute is not solved then states might seek other means, such as the good offices of a third party or a joint water body put in place (river commission), or agree to submit their dispute to an arbitral tribunal or the ICJ.[1253] For instance, in the case analysed in the previous section the dispute that existed regarding water quality standards between the United States and Mexico was solved through negotiations between the states.

The UN Watercourse Convention includes the mentioned dispute settlement mechanism. Nevertheless it is criticised for not emphasising the role of judicial procedures in the resolution of water disputes, because there is no a requirement to submit disputes to either the ICJ or arbitration tribunals.[1254] But to initiate a claim before the ICJ or an arbitral tribunal the consent of both states is required.

Since vital human needs resemble the needs that should be satisfied through the human right to water, and given that the former must be a priority among other uses, the inter-states mechanisms provided by international water law, could be a useful tool to protect the enjoyment of the human right to water when this is satisfied with shared

[1253] UN Watercourse Convention, Article 33; Berlin Rules, Articles 72 and 73.

[1254] Awn S. Al-Khasawneh, 'Do Judicial Decisions Settle Water-Related Disputes? In Laurence Boisson de Chazournes, Christina Leb and Mara Tignino (eds), *International Law and Freshwater, The Multiple Challenges* (Edward Elgar, Cheltenham 2013) 344.

watercourses and has been affected by extraterritorial actions or omission.[1255] In the event that a state initiate an inter-state mechanism the claim will not be regarding the protection of the human right to water, but instead concerning the satisfaction of vital human needs of the population dependent on the international watercourse, which at the end will serve for the purpose of protecting the human right.

B) Inter-state mechanisms in human rights law

At the international level, there are different mechanisms to review complaints concerning the violation of rights contained in international human rights treaties. Most of the international human rights conventions, agreed under the auspices of the UN, have adopted an optional protocol where state parties recognise the competence of the respective treaty body to receive and analyse complaints. The OP-ICESCR entered into force on 13 May 2013, strengthening the justiciability of ESC rights. As a result, a state can now initiate a claim against another state if it considers that an ESC right embraced in the ICESCR has been violated by that other state or it is not fulfilling its obligations under the ICESCR. For the time being, the application of the OP-ICESCR is very limited since the number of states that, so far, are a party to this Optional Protocol is very small. Until now only eleven states[1256] have ratified this Protocol. But it is expected that the number of state parties to this protocol will increase making the OP-ICESCR one of the most valuable instruments to seek redress in the event of a violation of an ESC right.

The OP-ICESCR was adopted with the purpose of further achieving the implementation of the rights enshrined in the ICESCR, where the human right to water is implicitly recognised.[1257] Although, some authors could argue about the justiciability of the human right to water, since this right is not explicitly incorporated in the ICESCR, I strongly believe that this potential debate will not be relevant in practice, since the treaty body and authoritative interpreter of the ICESCR, the CESCR, has interpreted in its General Comment 15 that the human right to water is implicitly included in article 11 of the

[1255] Regarding the dispute between Ecuador and Peru concerning the demarcation of the Peruvian-Ecuadorian frontiers an agreement regarding the utilization of waters was also made. 'The boundary line between Peru and Ecuador shall pass through the so-called old bed of the River Zarumilla. Hoverver, Peru undertakes, by this agreement, to take the necessary steps within three years, to guarantee the supply of water necessary for the life of the Ecuadorian villages on the right bank of the so-called old bed of the River Zarumilla'. Although this agreement was about boundary demarcation with rivers, it was also considered important to take into account the water needs of the population dependent. Declaration and exchange of notes concerning the termination of the process of demarcation of the Peruvian-Ecuadora fronties, Lima and Quito, 22 and 24 May 1944. Legal Problems Relating to the Utilization and Use of International Rivers-Report by the Secretary General (Extract from the Yearbook of the International Law Commission-1974, Vol. II(2)) UN Doc. A/5409, 92 <http://legal.un.org/ilc/documentation/english/a_5409.pdf> accessed 20 November 2013. Stephen McCaffrey, The Law of International Watercourses (2nd edn, OUP, Oxford 2007) 239.

[1256] Argentina, Bolivia, Bosnia and Herzegovina, Ecuador, El Salvador, Mongolia, Montenegro, Portugal, Slovakia, Spain, and Uruguay.

[1257] UN CESCR, 'General Comment 15, the right to water' (2002), UN Doc. E/C.12/2002/11, para 3.

ICESCR.[1258] Moreover, the CESCR, which is also the body in charge of receiving and examining complaints, has stated that *'[a]ny person or groups who have been denied their right to water should have access to effective judicial or other appropriate remedies at both national and international level'*.[1259] At the international level the appropriate body to provide an effective remedy regarding the non-compliance with the obligations that derived from the right to water is the CESCR. Therefore, it is highly unlikely that the CESCR will not receive a complaint concerning the violation of the right to water, given that this right is not explicitly set forth in the ICESCR, when the Committee itself is unmistakably pointing out that appropriate remedies should be available. Furthermore, there are two circumstances that indicate that the CESCR is very keen in the recognition and protection of the right to water, and therefore willing to receive and examine complaints regarding the violation of such a right. Fist, the fact that the CESCR is requesting, in its reporting guidelines, that states include information on the implementation of the human right to water as a separate right. Second, in its observations and recommendations the CESCR has expressed concern about different situation that are clearly denying access to safe drinking water to certain groups of people.

The OP-ICESCR provides two mechanisms to claim violation of ESC rights, which can only be initiated by states: inter-state communications and inquiry procedures.

Inter-state communications

The OP-ICESCR, in its article 10, provides the possibility to initiate inter-state complaints, whereby a state party can claim that another state party is not fulfilling its obligations under the Covenant. Thus, if a state considers that other state is not complying with its obligations regarding the human right to water, it can bring this mechanism into action. Inter-state communications may be received and considered only if submitted by a state party that has made a declaration recognising the competence of the CESCR and, if it concerns a state party that has also made such a declaration.[1260] So far only two state parties have made such a declaration.[1261] Therefore, the main disadvantage of this mechanism, for the time being, is the limited number of states that have recognised the competence of the CESCR.

During the open-ended working group that considered options regarding the adoption of an optional protocol the topic of international cooperation was discussed. While some states (developed countries) consider that international cooperation and assistance is a moral obligation but not a legal entitlement, other states (developing countries) consider that international cooperation is a legal obligation and should be reflected in the text of

[1258] UN CESCR, 'General Comment 15, the right to water' (2002), UN Doc. E/C.12/2002/11, para 3.
[1259] UN CESCR, 'General Comment 15, the right to water' (2002), UN Doc. E/C.12/2002/11, para 55.
[1260] OP-ICESCR, Article 10.
[1261] Up until now only El Salvador and Portugal have recognised the competence of the CESCR to receive and considered interstate communications.

an optional protocol.[1262] Riedel, an expert and member of the CESCR noted that the Committee regularly raised the issue of international cooperation in the reporting process by encouraging states to seek international assistance or to provide such assistance if they had the means to do so. Reidel also expressed that the Committee had not dealt with international assistance and cooperation in terms of violations. However, he also noted that a right to international assistance might be utilised in an inter-state procedure.[1263] This means that it is possible that when the CESCR start examining inter-state procedures it will take into account the obligations that derive from international cooperation and assistance, in other words the international obligations of ESC rights.

Inquiry procedure

The Optional Protocol, in its article 11, provides for an inquiry procedure. This mechanism allows the CESCR to initiate an inquiry when it receives reliable information indicating grave or systematic violation of ESC rights by a state party. Such inquiry is conducted confidentially and the cooperation of the state concerned is sought at all stages of the proceeding. The inquiry may include a visit to the country's territory.[1264] Just like the inter-state communication, the inquiry procedure also requires that the state concerned recognises the competence of the CESCR.[1265] Similarly, the same two states that recognise the competence of the Committee to receive inter-state communications, El Salvador and Portugal, have recognised the competence of the CESCR concerning inquiry procedures.

It should be noted that the neither the inquiry procedure nor the inter-state procedure refer to the need for victims to have been subjected to the jurisdiction of the state party whose conduct is in questions. Therefore, these procedures permit consideration of allegations of violations of extraterritorial obligations.[1266] For instance, when a riparian state is misusing international waters and as a consequence is violating the human right to water for individuals in other state.

There are a number of considerations that confirm the feasibility that the CESCR will examine extraterritorial violations of human rights. First, it should be noted that there is a legal obligation embraced in the article 2(1) ICESCR establishing that each state party undertakes to take steps, individually and through international assistance and

[1262] Commission on Human Rights, 'Report of the open-ended working group to considered options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its second session' 10 February 2005, UN Doc. E/CN.4/2005/52, paras 76-77.
[1263] Commission on Human Rights, 'Report of the open-ended working group to considered options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its second session' 10 February 2005, UN Doc. E/CN.4/2005/52, paras 63-79
[1264] OP-ICESCR, Article 11.
[1265] Up until now only El Salvador and Portugal have recognised the Competence of the ECSCR regarding inquiry procedure.
[1266] Ashfaq Khalfan, 'Accountability Mechanisms', in Malcolm Langford and others (eds), *Global Justice, State Duties, The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP, Cambridge 2013) 399.

cooperation to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognise in the Covenant.[1267] Provision from where it is understood international state's obligations emanate. Secondly, the CESCR has already spelled out the obligations that states should comply to implement ESC rights, obligations that are classified in territorial and international. In an eventual state-state procedure, the international obligations (protect, respect and fulfil) describe in General Comment 15 can be used as *lex ferenda* to indicate the duties that one state has toward another state. Thirdly, it is argued that according to customary international law a state cannot use its territory to cause damage on the territory of another state, which results in a duty for the state to respect and protect human rights extraterritorially.[1268] Fourthly, international cooperation and assistance is included in article 14 OP-ICESCR, which stipulates that the CESCR shall transmit to the UN specialised agencies, funds and programmes and other competent bodies, its views or recommendations concerning communications and inquiries that indicate a need for technical advice or assistance. The CESCR will consider international measure likely to contribute to assisting states in achieving progress in implementation of the ICESCR. This provision is established without prejudice to the obligations of each state party to fulfil its obligations under the Covenant.[1269]

Once the number of state parties to the OP-ICESCR exponentially grows and those states recognise the competence of the CESCR, the inter-state communications and the enquiry procedure could be used by a riparian state of an international watercourse to initiate a claim against another riparian state, when activities of the latter state in the shared waters affect the right to water of its inhabitants. When the admissibility conditions have been met for either an inter-state complaint or inquiry procedure, the CESCR may therefore, serve as forum to address extraterritorial ESC rights obligations where a nexus can be established between the conduct of a particular state and the violation of the rights of an individual or group in another state.[1270]

The typology of state's obligations that is employed by the CESCR can be used to assess the (in)actions of a state regarding the alleged extraterritorial violation of human rights. The extraterritorial obligations to respect and protect, are immediate obligations and apply simultaneously with the obligations of the domestic state.[1271] Therefore, lack

[1267] ICESCR, Article 2(1).
[1268] Oliver De Schutte and others, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights'(2012) 34 Human Rights Quarterly 1095-1096.
[1269] OP-ICESCR, Article 14.
[1270] Ashfaq Khalfan, 'Accountability Mechanisms', in Malcolm Langford and others (eds), *Global Justice, State Duties, The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP, Cambridge 2013) 398.
[1271] Wouter Vandenhole, 'EU and Development: Extraterritorial Obligations under the International Covenant on Economic, Social and Cultural Rights', in Margot E. Salomon, Arne Tostensen and Wouter. Vandenhole (eds), *Casting the Net Wider: Human Rights, Development and New Duty-Bearers* (Intersentia, Antwerp 2007) 87; Wouter Vandenhole and Wolfgang Benedek, 'Extraterritorial Human

of observance of international obligations cannot be justified by invoking the primary responsibility of the domestic state. However, the extraterritorial obligation to fulfil is of different nature, it is not a simultaneous by a subsidiary obligation,[1272] which comes to play a role when the rights of individuals in a particular state have not been satisfied. Due to the fact the some obligations overlap, it would be necessary to divide the domestic from the international obligations in order to determine state's responsibility regarding the extraterritorial infringement of a human right.

The extraterritorial obligation to respect is held by states that are in a position to negatively affect any individual's right to water, whether within or outside their territory. In certain circumstances a state may directly interfere with the realisation of the right to water in other countries without the participation of the domestic state, in such circumstances the state causing the harm extraterritorially would bear full responsibility for the violation of the obligation to respect.[1273] For example, when it can be proved that a particular water contamination is coming from another state, or when the construction of a dam significantly reduces the flow of water to the downstream country. Concerning the extraterritorial obligation to protect, it is alleged that in the event that a third party interfere with the right to water, this obligation is borne by the state in which the interference occurred and the state with jurisdiction or influence over that third party. According to Khalfan if only one state has the authority or influence to carry out necessary actions to prevent or remedy a violation, then this state solely bears the obligation to protect the right in question from the conduct of the actor.[1274]

As part of the obligation to facilitate (included in the obligation to fulfil) states should ensure that the right to water is given due attention in international agreements and, to that end, states should consider the right to water in the development of further legal instruments.[1275] According to international water law states sharing an international watercourse should agree on the shared management of the transboundary water resources. Since the principles of international water law are consistent with the human right to water, they should be taken into account. The extraterritorial obligation to fulfil is the most complex to identify. First, this is a subsidiary or secondary obligation that originates when the domestic state is not able to provide the human right to its

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Rights Obligations and the North-South Divide', in Malcolm Langford and others (eds) *Global Justice, State Duties: The extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP, Cambridge 2013) 337.

[1272] Wouter Vandenhole and Wolfgang Benedek, 'Extraterritorial Human Rights Obligations and the North-South Divide', in Malcolm Langford and others (eds) *Global Justice, State Duties: The extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP, Cambridge 2013) 338.

[1273] Ashfaq Khalfan, 'Division of Responsibility Among States' in Malcolm Langford and others (eds), *Global Justice, State Duties, the Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP, Cambridge 2013) 304.

[1274] Ashfaq Khalfan, 'Division of Responsibility Among States' in Malcolm Langford and others (eds), *Global Justice, State Duties, the Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP, Cambridge 2013) 310.

[1275] UN CESCR, 'General Comment 15, the right to water' (2002), UN Doc. E/C.12/2002/11, para 35.

inhabitants. It is argued that the extraterritorial obligation to fulfil emerge even if the domestic state have chosen not to fulfil ESC rights to the full extent of its ability.[1276] Second, it is considered that states can choose where to provide the international cooperation and assistance. Nevertheless, The CESCR considers that economically developed states have a special responsibility and interest to assist the poorer developing states facilitating the realisation of the right to water.[1277] However, this obligation is not limited to those states. The CESCR also affirms that international cooperation and assistance is stronger for states in a position to assist.[1278] In a transboundary water context the economic position might not be the most important element to provide assistance and cooperation in the realisation of the right to water. In this case, the geographical position of sharing a particular watercourse and the available water resources play an important role. The concerned riparian states are indeed in a position to assist each other in the adequate use and management of the international watercourse for the benefit of all the states sharing the same resource.

In the event that the CESCR has to examine a complaint concerning an extraterritorial violation of the right to water caused in the use of an international watercourse, it will be its task to assess the violation of the domestic and extraterritorial obligations of the states involved, since territorial and extraterritorial states' obligations apply simultaneously. The CESCR will have to consider case by case whether the actions or omissions of the concerned states sharing the same watercourse are in non-compliance with their respective domestic and international obligations, and therefore violating the human right to water.

6.3.4.2. Actions initiated by individuals against foreign states

Since human rights were originally considered to create vertical obligations between states and the individuals located within their territories, the general rule is that individuals who consider that their human rights have been or may be violated bring legal actions against their territorial state. The situation under study is different, since we consider that the actions, omissions, and decisions adopted in one state can produce extraterritorial effects in another state. The question that this situation generates is whether individuals located in one state can initiate actions against a foreign state, where the extraterritorial action originated. To solve this question, this section examines whether international water law and human rights law allow individuals located in one

[1276] Ashfaq Khalfan, 'Division of Responsibility Among States' in Malcolm Langford and others (eds), *Global Justice, State Duties, the Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP, Cambridge 2013) 321.
[1277] UN CESCR, 'General Comment 15, the right to water' (2002), UN Doc. E/C.12/2002/11, para 34.
[1278] UN CESCR, 'General Comment 3, the nature of States parties obligations (Art. 2, par. 1)' fifth session 14 December 1990, para 14.

state to initiate actions, whether judicial or not, against other states to seek redress for the violations of their rights.

A) Individual complaints under international water law

The UN Watercourse Convention provides in its article 32 the non-discrimination rule. Article 32 provides:

> *'Unless the watercourse States concerned have agreed otherwise for the protection of the interest of persons, natural or juridical, who have suffered or are under a serious threat of suffering significant transboundary harm as a result of activities related to an international watercourse, a watercourse State shall not discriminate on the basis of nationality or residence or place where the injury occurred, in granting to such persons, in accordance with its legal system, access to judicial or other procedures, or a right to claim compensation or other relief in respect of significant harm caused by such activities carried on in its territory'.*

According to this provision, once the UN Watercourse Convention enters into force, if watercourse states have not agreed about a particular mechanism for protecting the interest of persons concerning transboundary harm, state parties must allow individuals located in another state access to judicial or other procedures to initiate a claim concerning transboundary harm caused by an activity carried out on its territory. Thus, if people in state party 'B' suffer a significant transboundary harm, such as been affected in the enjoyment of their vital human needs, as a result of activities in an international watercourse caused in state party 'A', the latter state unless agreed otherwise for the protection of the interests of persons, shall allow that the affected individuals of state party 'B' initiate within its legal system judicial or other procedures in respect of the extraterritorial harm. It should be borne in mind that the UN Watercourse Convention subordinate the obligation not to cause harm to the principle of equitable and reasonable utilisation,[1279] where priority is given to vital human needs. Lack of access to safe drinking water, caused by the action of another state, can lead to problems of public health to the group of individuals affect, an a detrimental impact on public health, is considered by the ILC as significant harm.[1280] Article 32 provides individuals with a remedy to protect their interest in the satisfaction of their vital human needs,[1281] which will also contribute to the protection of the human right to water, since both try to satisfy the same basic needs. As a result, this provision opens the door to an

[1279] Joseph W Dellapenna, 'The Customary International Law of Transboundary Fresh Waters' (2001) 1 (3/4) International Journal of Global Environmental Issues 285.

[1280] International Law Commission (ILC), 'Report of the Commission to the General Assembly in the Work of its Fortieth Session' (9 May -29 July 1988) UN Doc. A/43/10, 36 <http://legal.un.org/ilc/documentation/english/A_43_10.pdf> accessed 31 July 2013.

[1281] Chirstina Leb, Cooperation in the Law of Transboundary Water Resources (CUP, Cambridge 2013) 214.

extraterritorial protection of human rights.[1282] Based on the commentaries of the ILC this article obliges states to ensure that any person, whatever his nationality or place of residence, who has suffered significant transboundary harm as a result of activities related to an international watercourse should, regardless of where the harm occurred or might occur, receive the same treatment as that afforded by the country of origin to its nationals in case of domestic harm. This article provides that if significant harm is caused in state 'B' as a result of conduct in state 'A', state 'A' may not bar an action on the grounds that the harm occurred outside its jurisdiction.[1283] Article 32 is the only provision in the UN Watercourse Convention that refers to persons and not to states; and it is explicit in its objective of protecting individuals. This article empowers residences of all riparian states to access procedure that can enjoin foreign riparian states to respect the human right to water extraterritorially. In case of a transboundary threat or violation to their human right to water, foreign right-holders can seek remedies.[1284]

The Berlin Rules also comprise similar provisions that indicate that a person who suffers or is under serious threat of suffering damage from the management of water or the aquatic environment in another state shall be entitled to institute proceedings before a competent court or administrative authority of that state in order to obtain an appropriate remedy.[1285] Additionally, in providing access to courts and remedies to persons who suffer or are under a serious threat of suffering damage, states must not discriminate on the basis of the nationality or residence of the person claiming damage or the place where the damage occurred or may occur.[1286]

This non-discrimination rule concerning access to justice in foreign states is considered to be international customary law since it has already been incorporated in different international treaties,[1287] although related to environmental protection. However, this

[1282] Chirstina Leb, Cooperation in the Law of Transboundary Water Resources (CUP, Cambridge 2013) 215.
[1283] International Law Commission, Draft articles on the law of the non-navigational uses of international watercourse and commentaries thereto and resolution on transboundary confined groundwater 1994', (United Nations 2005) 132-133 <http://legal.un.org/ilc/texts/instruments/english/commentaries/8_3_1994.pdf> accessed 2 October 2013.
[1284] Takele Soboka Bulto, *The Extraterritorial Application of the Human Right to Water in Africa* (CUP, Cambridge 2014) 218.
[1285] Berlin Rules, Article 69.
[1286] Berlin Rules, Article 71.
[1287] See Water Resource Committee of the International Law Association, 'Helsinki Revision: Sources of the International Law Association Rules on Water Resources' <http://www.ila-hq.org/en/committees/index.cfm/cid/32> accessed 23 October 2013. The following sources represent the customary international law on the adopted provision. Some of those sources are: the Montreal Rules on pollution, New Delhi Declaration on Sustainable Development, World Charter for Nature, Rio Declaration, NAFTA Side Agreement on the Environment, Aarhus Convention African Convention on the Conservation of Nature and Natural Resources. According to the International Law Commission the precedent of the non-discrimination are contained in for instance article 3 of the Convention on the Protection of the Environment, between Denmark, Finland, Norway and Sweden of 1974. International Law Commission, Draft articles on the law of the non-navigational uses of international watercourse and

non-discrimination rule has not been really tested in international water disputes; but this situation might change.[1288] For instance, using again the case between the United States and Mexico, a recent case-law concerning the All-American Canal[1289] illustrates how a Mexican organisation brought a legal action against the United States before an American court. The case concerns a water dispute in the Mexican-California border and the plans of the United States to line the All-American Canal to prevent seepage loss that recharged the Mexicali Aquifer, situated under the Mexican Valley in Mexico and the Imperial Valley in California. The lining means that the seepage that recharges the aquifer on the Mexican side will be considerably reduced or completely stopped.

This case is used only to exemplify whether the rule of non-discrimination is in fact applied or not regarding international waters. On 19 July 2005 a class action law suit was filed by a Mexican organisation known as Consejo de Desarrollo Economico de Mexicali A.C. along with two United States organisations, Citizens United for Resources and the Environment (CURE) and Desert Citizens Against Pollutions (DCAP), against the United States Government, the Secretary of the Department of Interior and the Commissioner of the Bureau of Reclamation. The law suit was filed in the United States District Court in Las Vegas.[1290] When considering the case, the District Court granted a motion presented by the defendant to dismiss the claims made by the Mexican organisation due to lack of standing.[1291] The court denied the motions of the other plaintiff's and allowed the project to continue. The decision of the District Court was appealed and the plaintiffs obtained a temporary injunction halting further work on the project until a final decision was taken.

Since the construction of the All American Canal Lining project has been of great relevance for the country, the Government of the United States got involved and while the case was being decided by the appellant court, the parliament enacted the Tax Relief and Health Care Act 2006 before the Appellate Court took the final decision. This federal legislation indicated that upon the date of enactment of the Act, the Secretary shall, without delay, carry out the All American Canal Lining Project. The 2006 Act also provided that the Treaty between United States of America and Mexico relating to the allocation of the waters of the Colorado and Tijuana Rivers, and of the Rio Grande,

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commentaries thereto and resolution on transboundary confined groundwater 1994', (United Nations 2005) 133.

[1288] Salman M.A. Salman, 'International Water Disputes: A New Breed of Claims, Claimants and Settlement Institutions' (2006) 31 (1) Water International 7.

[1289] All American Canal carries water from the Colorado River, which is a transboundary river shared between the United States of America and Mexico.

[1290] Salman M.A. Salman, 'International Water Disputes: A New Breed of Claims, Claimants and Settlement Institutions' (2006) 31 (1) Water International 7.

[1291] Consejo de Desarollo Economico de Mexicali, AC v. United States, 482 F.3d 1157 (9th Cir. 2007), 6 April 2006, paras 24-25. Judge Philip Pro concluded that Mexicali lack standing to assert claims because Fiths Amendment Due Process protections do not extend to 'aliens outside of United States Territory'. Nicole Ries, 'The (Almost) All-American Canal: Consejo de Desarrollo Economic de Mexicali v. United States and the Pursuit of Environmental Justice in Transboundary Resource Management' (2008) 35 Ecology Law Quarterly 505.

is the exclusive authority for indentifying, considering, analysing, or addressing impacts occurring outside the boundary of the United States of works constructed, acquired, or used within the territorial limits of the United States.[1292] It seems that this Act appeared to tell the court to keep out of the debate, since the existing treaties between the United States and Mexico should settle that water dispute.[1293]

When the Appellate Court examined the claims presented by the plaintiffs, it did not dismiss the claims asserted by the Mexican organisation nor did it indicate lack of standing. The Appellate Court examined the claims asserted by the Mexican organisation, but could not conclude otherwise than to say the district court lacked jurisdiction.[1294] Ultimately, adherence to the terms of the 1944 Treaty in combination with the 2006 Act precluded the Court from being able to provide a legal remedy to those adversely affected by the project.[1295] It could be said that in this case the Appellate Court did apply the non-discrimination rule, since the Mexican citizens were not discriminated on the basis of their nationality or residence. Nevertheless, the decision could be considered as bias because of the interference of the government of the United States with the enactment of a federal Act that restricted the decision of the appellant court.

B) Individual complaints under human rights law

The OP-ICESCR provides the possibility for individuals to complaint about the actions or omissions of a state that violates ESC rights. Article 2 of the OP-ICESCR provides:

> *'Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the Economic, Social and Cultural Rights set forth in the Covenant by that State Party'*.[1296]

While the ICESCR does not mention at any time the words territory or jurisdiction, and refers instead to international cooperation and assistance, the OP-ICESCR includes the expression 'under the jurisdiction', which may restrict the scope of application of

[1292] Consejo de Desarollo Economico de Mexicali, AC v. United States, 482 F.3d 1157 (9th Cir. 2007), 6 April 2006, paras 28-33; Nicole Ries, 'The (Almost) All-American Canal: Consejo de Desarrollo Economic de Mexicali v. United States and the Pursuit of Environmental Justice in Transboundary Resoruce Management' (2008) 35 Ecology Law Quarterly 515.
[1293] Nicole Ries, 'The (Almost) All-American Canal: Consejo de Desarrollo Economic de Mexicali v. United States and the Pursuit of Environmental Justice in Transboundary Resoruce Management' (2008) 35 Ecology Law Quarterly 516.
[1294] Consejo de Desarollo Economico de Mexicali, AC v. United States, 482 F.3d 1157 (9th Cir. 2007) 6 April 2006, paras 54- 67.
[1295] Nicole Ries, 'The (Almost) All-American Canal: Consejo de Desarrollo Economic de Mexicali v. United States and the Pursuit of Environmental Justice in Transboundary Resoruce Management' (2008) 35 Ecology Law Quarterly 504.
[1296] OP-ICESCR, Article 2.

individual communications particularly concerning extraterritorial violations of human rights. Although the term jurisdiction has been discussed in relation to the extraterritorial application of other conventions, such as the ICCPR and the European Convention, the OP-ICESCR does not clarify its meaning.

Individual communications as provided for the OP-ICESCR may be limited in its application mainly due to two reasons. First, if jurisdiction is considered to be confined to the territory of each state party then, the scope of application of this mechanism will not cover individuals seeking protection of their rights, when they have been extraterritorially violated. Therefore, complaints concerning extraterritorial infringement of the right to water caused by a state, when the claimant is not within the territory of that state, seem to be unlikely to succeed. However, the CESCR could also take a broader interpretation of the term jurisdiction. For instance, similar to the one provide by a group of experts on the Maastricht Principles on Extraterritorial Obligations, where the notion of jurisdiction includes situations of: 1) authority or effective control, [1297] 2) foreseeable effects, or 3) a position to exercise decisive influence or to take measure to realise ESC rights.[1298] This possible limitation originated by incorporating the term jurisdiction will be clarified once the CESCR determine the interpretation that shall be given to this term. Second, the application of the OP-ICESCR is also restricted by the small number of states that until now have ratified the Protocol. As Khalfan affirms, while the OP-ICESCR obtains widespread ratification or

[1297] The CESCR has already asserted that the ICESCR also apply to individuals that although not located within the territory of the state are under its effective control. On the concluding observation regarding the report of Israel 'the Committee also reiterates its concern about the State party's position that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction, and that the Covenant is not applicable to populations other than the Israelis in the occupied territories (…) The Committee reaffirms its view that the State party's obligations under the Covenant apply to all territories and populations under its effective control'. UN CESCR, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel 05/23/2003', UN Doc E/C.12/Add.90, para 15 and 31. Also the HRCom has also interpreted that the term jurisdiction incorporates the territories over which a state has power of effective control. "States Parties (to the ICCPR) are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. (…) the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation." UN HRCom, 'General Comment 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant', adopted 29 March 2004, UN Doc. CCPR/21/Rev.1/Add.13, para 10.

[1298] Wouter Vandenhole, 'Beyond Territoriality: The Maastricht Principles on Extra-Territorial Obligations in the Area of Economic, Social and Cultural Rights' (2011) 29 (4) Netherlands Quarterly of Human Rights 433; Olivier de Schutter and others, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 Humans Rights Quarterly 1104.

accession by states, individuals seeking to make a claim regarding a violation of an extraterritorial obligation are limited to seeking for assistance of non-governmental organisations (NGOs) in consultative status with ECOSOC as part of the periodic reporting procedure.[1299]

Individuals whose rights have been infringed by an extraterritorial state may have a claim: 1) against their own state, if it is failing to take steps within its power to prevent or mitigate the damage caused by the extraterritorial state; 2) against their own state, when this is infringing the right in conjunction with the extraterritorial state; and 3) against the extraterritorial state on the basis of its action or omission.[1300]

To sum up it can be said that both human rights law and international water law offer some mechanisms to obtain redress when there is an extraterritorial violation of the right to water. Although, international water law do not explicitly refer to such a right, this objective can be achieved by claiming the protection of vital human needs of the population dependent on international waters.

6.4. Conclusions

It is known that states and other actors have the capacity to directly or indirectly impact the human rights of individuals located in other states. Also, the realisation of certain rights cannot be simply seen or achieved by the duty of each particularly country separately, some require international cooperation. The legal basis for the recognition of international obligations in the field of human rights and particularly ESC rights is found in the explicit reference to international cooperation and assistance incorporated in a number of international instruments, such as the UN Charter, the UDHR and the ICESCR. International obligations refer to the duties that one state has towards other state, which is the typical horizontal relationship that is expected in international law (state-state). The CESCR affirms in its General Comments that state parties not only have obligations towards the individuals located within their territories, but they also have obligations towards other countries, the so called international (extraterritorial)

[1299] Rules of Procedure of the Committee, Rule 69 1. Non-governmental organisations in consultative statues with the Council may submit to the Committee written statements that might contribute to full and universal recognition and realisation of the rights contained in the Covenant
2. In addition to the receipt of written information, a short period of time will be made available at the beginning of each session of the Committee's pre-sessional working group to provide NGOs with an opportunity to submit relevant oral information to the member of the working group. This information is considered to be other source of information concerning the examination of states report. UN CESCR, 'Rules of Procedure of the Committee, provisional rules of procedure adopted by the Committee at its third session (1989)', (1 September 1993) UN Doc. E/C.12/1990/4/Rev.1 Ashfaq Khalfan, 'Accountability Mechanisms', in Malcolm Langford and others (eds), *Global Justice, State Duties, The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP, Cambridge 2013) 400.

[1300] Ashfaq Khalfan, 'Division of Responsibility Among States' in Malcolm Langford and others (eds), *Global Justice, State Duties, The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (OUP, Oxford 2013) 306.

obligations, which are relevant for the full realisation of ESC rights.[1301] The international human rights obligations are divided in obligations to respect, protect and fulfil. The international obligations to respect and protect apply simultaneously with the territorial state's obligations. However, the international obligation to fulfil is considered to have a subsidiary character and should come into play when the territorial state has not being able to realise ESC rights for the individuals within its territory or jurisdiction. It should be borne in mind that the international obligation to fulfil does not only focuses on the duty to provide, or in the case of the human right to water to transfer water to states that are in difficulties to satisfy this right. In fact, the obligation to fulfil also includes other obligations such as to facilitate or set up conditions that allow other states to implement the human right to water. The enforceability of these international obligations is still in a process of development that can be consolidated through the ratification and use of the OP-ICESCR. The issue of division of obligations between the domestic and extraterritorial duties or joint responsibility between the international community and the territorial states is still under discussion.[1302]

The recognition of the mentioned international obligations in the field of ESC rights can be reinforced by the incorporation of the right of access to water in the Berlin Rules, since the latter reproduces the definition adopted by the CESCR on the human right, as well as the typology of obligations that derive from such a right (respect, protect, fulfil). Since the right of access to water applies to both national and international waters, states' obligations also apply nationally and internationally. In other word, states have obligations towards their own citizens, and towards other states sharing the same watercourse.

In transboundary water context the main principles of international water law (equitable and reasonable utilisation, no significant harm rule and the obligation to cooperate) and the international obligations that derive from the human right to water (obligations to respect, protect and fulfil) correlate with each other. The principles of international water law can greatly contribute to the implementation of the right to water in a transboundary context. According to these principles states sharing an international watercourse must give priority to water use for vital human needs of the population dependent on the watercourse, states should cooperate in the management of such a resource and avoid causing significant harm to each other.

Both international water law and human rights law provide mechanisms of redress in case there is an extraterritorial violation of the right to water. Although, international water law does not specifically refer to the human right to water, this objective can be

[1301] UN CESCR, 'General Comment 14, the right to health' (2000), UN Doc. E/C.12/2000/4; UN CESCR, General Comment 15, the human right to water', UN Doc. E/C.12/2002/11; UN CESCR, 'General Comment 18, the right to work' (2005), UN Doc. E/C/12/GC/18; and UN CESCR, 'General Comment 21, the right to everyone to take part in cultural life' (2009), UN Doc. E/C.12/GC/21.

[1302] See Malcolm Langford and others (eds), *Global Justice, States Duties, The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP, Cambridge 2013).

achieved by seeking the protection of the use of water for vital human needs. Some of those mechanisms can be initiated by states and other can be initiated by individuals. International water law incorporates the principle of non-discrimination (article 32 of the UN Water Convention and article 69 of the Berlin Rules), which mandates that states must allow individuals located in another state access to judicial or other procedure to initiate a claim concerning transboundary harm caused by an action or omission carried out in its territory. On the other hand, the OP-ICESCR allows individuals to submit a communication claiming to be victims of a violation of the rights set forth in the ICESCR by a state party; however, it is mentioned that the individual should be under the jurisdiction of that state party. It is possible that the inclusion of the term jurisdiction may restrict the scope of application of individual communications, and therefore, extraterritorial claims might be out of the scope of this mechanism. However, it is likely that the CESCR give a broad interpretation to the term jurisdiction allowing extraterritorial claims to be submitted. This ambiguity will be resolved once the CESCR start reviewing individual complaints and clarify how the term jurisdiction should be interpreted.

CHAPTER VII

7. GENERAL CONCLUSIONS

This study aimed to answer two main questions: firstly, whether and in what ways a human right to water is acknowledged, either as an independent right or as a derivative human right, and what is precisely the content of this right. Secondly, whether the human right to water can be applied in an extraterritorial context creating obligations between states, and whether international water law can be used to support a human right to water in a transboundary watercourse context.

7.1 Acknowledgement of the human right to water under human rights law

Despite the essential role that water plays for survival and human development, the recognition of the human right to water was slow and in some cases controversial. Although access to safe drinking water as a human right started to be discussed since the 70's, it was not until 2002 that the human right to water was for the first time defined and authoritatively recognised by the CESCR in General Comment 15. The recognition of this right has been controversial mainly due to its absence in international human rights conventions, and the possible obligations that this right might generate for states,[1303] particularly extraterritorial obligations related to the transfer of water to water-short countries.[1304]

The recognition of the human right to water has gone through an evolutive process. At the international level, this process can be summarised in the following phases. First, the acknowledgement of the human right to water was debated by scientists, politicians and experts in different fields at various international conferences, due to the growing awareness about water scarcity. Then, explicit reference to drinking water was incorporated in some international human rights conventions as a component of other human rights. States have acknowledged the essential function of drinking water for the implementation of a number of human rights, as evidenced by their reports under the monitoring mechanisms to the UN treaty bodies. Similarly, UN treaty bodies have

[1303] For instance the United States of America abstained from voting on the adoption of Resolution 64/292 because 'the legal implications of a declared right to water have not yet been carefully and fully considered'. UNGA '18th Plenary meeting' (28 July 2010) UN Doc. A/64/PV.108, p 8.

[1304] For instance Argentina and Canada have expressed that they recognise the human right to water, but they made reservations regarding its international application. Argentina declared that '*the right to water and sanitation is a human right that every State must ensure for the individuals within its jurisdiction and not with respect to other States*'. UNGA '18th Plenary meeting' (28 July 2010) UN Doc A/64/PV.108, p 9; Canada affirmed that '*it is Canada's understanding that this right [the human right to safe drinking water and sanitation] does not encompass transboundary water issues including bulk water trade, nor a mandatory allocation of international development assistance…*'. Organization of American States (General Assembly) 'Resolution The Human Right to Safe Drinking Water and Sanitation'(adopted at the 4th plenary session, 5 June 2012) AG/RES.2760 (XLII-0/12), footnote 2. Canada abstained to vote regarding the adoption or UNGA Resolution 64/292. One of the reasons was that '*Canada takes its human rights obligations seriously, and before agreeing to be bound by new international obligations, Canada must ensure that it can meet those obligations domestically*'. UNGA '18th Plenary meeting' (28 July 2010) UN Doc. A/64/PV.108, p 17.

expressed in their recommendations and observations the essential role that water plays for the implementation of human rights. Additionally, UN treaty bodies have declared in their (quasi)judicial decisions that deprivation or lack of access to sufficient water, or unsafe drinking water can lead to the violation of several human rights. The human right to water is considered to be implicit in various rights, including: the right to life; prohibition of torture, degrading and inhumane treatment; the right to health; and the right to an adequate standard of living. Finally, the CESCR in its General Comment 15 defined the human right to water, established its normative content and identified the obligations of states (territorial and extraterritorial). The human right to water *'entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements*'.[1305] This right is identified as an independent right that belongs to the category of economic, social and cultural rights. The human right to water is equally essential for the realisation of other human rights, such as the right to life, the right to health and the right to human dignity. The CESCR continued strengthening the recognition of the human right to water as a stand-alone right by requesting states to provide information on the implementation of this independent right in the new reporting guidelines to the ICESCR.

According to the CESCR the main elements that compose the normative content of the human right to water are: availability, quality, and accessibility of drinking water.[1306] Availability means that the water supply for each person must be sufficient and continuous for personal and domestic uses, including water consumption for beverages and foodstuffs, hand washing, shower, washing of clothes and disposal of human excreta. Thus, a minimum amount of water should be guaranteed to satisfy those basic human needs. Under certain circumstances some individuals or groups may require additional amounts of water, for instance due to health, climate and working conditions. Therefore, it is very difficult to determine the exact amount of water (one fits all) that is required to fulfil the needs that the human right to water incorporates. The WHO has published guidelines on the quantity of water that should be available for each person. Studies of the WHO found out that quantities between 50 to 100 litres of water per person per day should be sufficient to satisfy most basic hygienic and consumption needs, and to avoid most health concerns. Nevertheless, quantities between 100 to 300 litres of water per person per day would be necessary to cover all basic needs without arising health concerns.[1307] States are expected to take into account those guidelines when determining the minimum amount of water that must be guaranteed to all at the domestic level. In addition, other amounts of water have been proposed for detainees or

[1305] UN CESCR 'General Comment 15, the right to water' (2002) UN Doc. E/C.12/2002/11, para 2.
[1306] UN CESCR 'General Comment 15, the right to water' (2002) UN Doc. E/C.12/2002/11, paras 10-12.
[1307] Guy Howard and Jamie Bartram, 'Domestic Water Quantity, Service Level and Health', World Health Organization 2003, WHO/SDE/WSH/03.02, p 22

prisoners and for extreme or emergency situations in case water is not sufficiently available.[1308]

Quality means that water used for personal consumption and hygiene is safe and not risky for human health. Water must be free from microbial pathogens, chemical and radiological substances. Despite the fact that safe water is essential for human health, there are no universal binding water quality standards. However, the WHO has developed some guidelines concerning drinking water quality for the protection of public health. The main reason for only promoting guidelines, instead of compulsory international standards, is the advantage provided by the use of a risk-benefit approach in the establishment of national standards and regulations, since not all countries are under the same social, economic and environmental circumstances.[1309]

Accessibility means that water, water facilities and services must be accessible to all, including the most vulnerable or marginalised groups of the population. There should be no discrimination on any ground in accessing safe drinking water. This element is subdivided in physical, economic and information accessibility. Physical accessibility means that water should be within or in the immediate vicinity of each household, educational institution or workplace. If there is no tap water at each of those places, then access to drinking water should be located within a distance not superior to 1,000 meters from the household and collection time should not exceed 30 minutes.[1310] Economic accessibility means that drinking water must be affordable for all. It requires that the costs related to water or cost recovery should not deprive a person from accessing safe drinking water. In order to make water affordable to all, particularly for the poor or marginalised, states must adopt measures to ensure economic access, such as cross-subsidies, direct subsidies, minimal charges or even the provision of free drinking water. The element of information on accessibility includes the right to seek, receive and impart information concerning water issues. The CESCR also declared that *'[a]ny person or groups who have been denied their right to water should have access to effective judicial or other appropriate remedies at both national and international levels'*,[1311] emphasising in this way on the justiciability of the human right to water.

At the regional level we can also observe an evolution in the recognition of the human right to water. Some decades ago there were only three regional human rights systems:

[1308] The Sphere Project, *The Sphere Project, Humanitarian Charter and Minimum Standards in Humanitarian Response*, (3rd edn, The Sphere Project, 2001); International Committee of the Red Cross, 'Water, Sanitation, Hygiene and Habitat in Prisons (International Committee of the Red Cross 2012) 38, 45 <http://www.icrc.org/eng/assets/files/publications/icrc-002-4083.pdf> accessed 24 September 2013; Inter-American Commission on Human Rights, Report on the Human Rights of Persons Deprived of Liberty in the Americas', OEA/Ser.L/V/II. Doc 64, 31 December 2011, para 483 <http://www.oas.org/es/cidh/ppl/docs/pdf/PPL2011esp.pdf> 24 September 2013.

[1309] World Health Organization, *Guidelines for Drinking-water Quality* (4th edn WHO, Gutenberg 2011) 1.

[1310] Guy Howard and Jamie Bartram, 'Domestic Water Quantity, Service Level and Health'(WHO/SDE/WSH/03.02) (World Health Organization, 2003) 18 22.

[1311] UN CESCR 'General Comment 15, the right to water' (2002) UN Doc. E/C.12/2002/11, para 55.

the Inter-American, the European and the African. None of the treaties on human rights adopted under these systems recognised the right to water as an independent right nor did they refer to drinking water in any way. Since 2003, references to drinking water have been explicitly incorporated in the text of some regional treaties. The first regional treaty that explicitly referred to drinking water was the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Therein 'access to clean drinking water' is included as part of the right to food security (article 15). Then, two embryonic human rights systems started to develop: one under the auspices of the League of Arab States and another under the ASEAN. In 2004, the League of Arab States adopted the Arab Charter on Human Rights in which 'safe drinking water' is explicitly included as an essential element of the right to health. Afterwards, the ASEAN adopted the ASEAN Human Rights Declaration, which explicitly incorporates 'the right to safe drinking water and sanitation', as part of the right to an adequate standard of living. On 5 June 2013, two new conventions were adopted by the OAS: the Inter-American Convention against All Forms of Discrimination and Intolerance and the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance. These conventions provide that discrimination of 'the right of every person to access and sustainably use water' is not allowed.[1312]

The bodies charged with the responsibility to monitor compliance of regional human rights conventions have found ways to fill the gap left by those regional conventions[1313] in which reference to water is almost totally absent. These regional human rights bodies have inventively extended human rights to guarantee the right to water. Under the European system the right to water is considered to derive from: the prohibition on torture, cruel and inhumane treatment; the right to housing; and the right to a healthy environment. The latter right is considered to be implicit in the right to respect for private and family life. According to the African system the right to water is protected through the right to dignity (prohibition to cruel, inhumane or degrading treatment), the right to health, the right to a healthy environment, and the right to development. For the Inter-American system the right to water is considered to be implicitly included in the right to life and the right to human treatment. The IACtHR has extended the scope of application of the right to life by incorporating the right to a 'dignified life' or a 'decent existence', which requires states to take positive measures that generate conditions compatible with human dignity. The IACtHR established the four main elements that are essential to guarantee the right to a decent existence: 1) access to and quality of water; 2) access to food; 3) education; and 4) health. In this way, the IACtHR has

[1312] Inter-American Convention against All Forms of Discrimination and Intolerance, Article 4(xiv); Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance, Article 4(xiv).

[1313] The European Convention, the European Social Charter (Revised), the European Convention on the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the African Charter, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, and the African Charter on the Rights and Welfare of the Child.

included economic and social rights within the right to life to make the former ESC rights immediately justiciable. Based on regional judgments and decisions, we can conclude that there is some overlap in the rights that are used by the regional bodies to achieve the protection of the human right to water. All three regional systems concur that the right to water derives from the prohibition to cruel inhumane or degrading treatment. Also, for the African and the European system the right to water is implicitly included in the right to a healthy environment.

At the domestic level, a number of countries in South America have recognised the human right to water as both a derivate and an independent right in their Constitutions, their legislation or by the jurisprudence of their courts. Nevertheless, there is a growing tendency among South American countries to adopt the human right to water as an independent right. Among the countries that are following this trend are: Bolivia, Colombia, Ecuador, French Guyana[1314], Paraguay, Peru, Uruguay and Venezuela. Regarding the four countries under study we can conclude that Colombia was the first country in South America that endorsed the human right to water as early as 1992. Colombia recognises this right through the jurisprudence of the Constitutional Court based on the doctrine of unenumerated rights, since the right to water is not explicitly included in the catalogue of fundamental human rights of the Constitution. The Constitutional Court has developed an extensive line of jurisprudence, fleshing out the content of the human right to water. Due to this evolution in jurisprudence the human right to water can be considered an independent right. The Colombian Constitutional Court is following international developments on the right to water and has relied on General Comment 15 and the Inter-American System to determine the main elements of the right to water and the minimum amounts of water that should be guaranteed. Similarly, Argentina recognises the right to water through the jurisprudence of its courts according to the doctrine of unenumerated rights. However, in Argentina the human right to water is considered to be implicitly included in the right to life, the right to health and the right to a healthy environment. Thus, Argentina recognises the right to water as a derivative right. Bolivia has experienced an evolutive process, which began by protecting the right to water through the jurisprudence of the Constitutional Tribunal as a derivative right that was implicit in the right to life, the right to health and the right to a dignified life.[1315] Afterwards, due to the negative consequences of the privatisation of drinking water services, the human right to water was explicitly incorporated in the Constitution in 2009 as an independent right. Chile is a very particular country regarding the recognition and implementation of the human right to water. Chile has ratified different international human rights conventions, including the ICESCR, which

[1314] French Guyana, which is located in South America, is an overseas region of France and therefore follows French legislation, which acknowledges the fundamental right to water in law 2006-1772 of 30 December 2006.

[1315] Bolivian Constitutional Tribunal, constitutional decision 659/2002-R, Judge Rapporteur: René Baldivieso Guzmán, 7 June 2002; Bolivian Constitutional Tribunal, constitutional decision 980/2001-R, Judge Rapporteur: José Antonio Rivera Santivañez, 14 September 2001.

implicitly incorporate the human right to water. However, there is no sufficient evidence to support the acknowledgement of this right at the national level, basically for two reasons. Firstly, there are two contradictory interpretations regarding the legal ranking of international treaties in the Chilean legal system. On the one hand the Supreme Court considers that rights included in international human rights conventions ratified by Chile have constitutional hierarchy. On the other hand the Constitutional Tribunal has objected this interpretation, since it would allow a modification of the Constitution without following the respective parliamentary procedure. Secondly, neither the Constitution nor Chilean legislation incorporates this right, nor is there sufficient jurisprudence that recognises the right to water. So far only three judicial decisions have interpreted that the right to water is derived from the right to life and the right to health.

At this time, one can say that the recognition of the human right to water at all levels (international, regional and national) is undeniable. However, there is no uniformity in the way this right is recognised. The human right to water has a dual character at all levels, in some jurisdictions as a derivative right and in others as an independent right. Cahill has already noted the 'unique status' of the right to water, a status that is unclear and requires clarification.[1316] This study contributes to resolving the question of whether the recognition of the right to water as a derivative right is sufficient to guarantee access to safe drinking water to every individual, or whether it is preferred to acknowledge it as an independent human right. To continue recognising the human right to water as a derivative right will limit its scope of application depending on the object (e.g. health, dignity, life, or healthy environment) and the subject (e.g. prisoner, indigenous people, children, or women) that the original human right aims to protect. As a derivative right, access to safe drinking water is subordinated to the main object and subject of the right from which it emanates. Regarding the subject of the right, it can be said that some human rights are only addressed to certain individuals or groups of people. For instance, if the right to water is considered to derive from the right to respect the human dignity of persons deprived of their liberty, this right can only guarantee access to safe drinking water to prisoners and detainees. In the event that this is the only human right through which the right to water is safeguarded in a particular country or regional system, this circumstance will restrict the possibility for other individuals to claim access to safe drinking water. In other words, individuals who are not deprived of their liberty cannot claim through the right to respect the human dignity of persons deprived of their liberty, access to safe drinking water. Likewise, in the event that the right to water is deemed to derive from the right to life, and an individual is being negatively affected on his or her health by receiving unsafe tap water, this individual might not be able to claim the protection of the right of access to safe water, unless his or her life is at stake. If the negative health conditions caused by unsafe water is not life-threatening, the individual will not be able to claim the protection of his or her right to water through the protection

[1316] Amanda Cahill, ''The Human Right to Water- A Rights of Unique status': The Legal Status and Normative Content of the Right to Water' (2005) 9 (3) The International Journal of Human Rights 395

of the right to life, because the is no real and eminent risk. Moreover, the object of the rights from which the right to water derives can play an important role to determine the minimum amounts of water that should be guaranteed. The quantity of water necessary to ensure the right to water may differ from each primary right.[1317] For instance, the right to respect the dignity of persons deprived of their liberty might guarantee smaller quantities than those that should be guaranteed by the right to life. Similarly, the right to an adequate standard of living could ensure larger amounts of water compared to the right to life.[1318] Depending on the substantive human rights from which the right to water derives, its characteristics or content can change according to the object and subject of the original right. Also, existing substantive rights offer only a narrow scope of protection for individuals suffering from water pollution or deprivation of clean water.[1319] All these circumstances generate a disparity in the implementation of the right to water, because access to sufficient safe drinking water in certain countries or regional systems can only be guaranteed for certain individuals and under certain conditions. If the right to water is not acknowledged as an independent right, courts are left on a trembling ground of creatively extending human rights to recognise or guarantee access to safe drinking water to individuals in need.[1320] Due to the present fragmented implementation, the human right to water should be acknowledged as an independent right to guarantee a more comprehensive, comparable and equal right to water to every single human being.

7.2. Extraterritorial application of the human right to water and its relationship with international water law

Human rights were devised to protect individuals from the exercise of power of their states. Therefore, human rights are framed in a territorial perspective, creating a vertical relationship between states and their inhabitants. Nevertheless, some international conventions on human rights, particularly those related to ESC rights, explicitly refer to international assistance and cooperation. The latter is interpreted as the legal basis for establishing states' extraterritorial obligations. Reference to international assistance and cooperation is found in the UN Charter (article 1(3)), the UDHR (articles 22 and 28) and the ICESCR (articles 2(1), 11, 15, 22 and 23). Scholars argued that the scope of application of the ICESCR is broader, particularly compared with its brother convention the ICCPR, since no mention is made whatsoever to territory or jurisdiction within the Covenant. According to the preparatory works of the ICESCR, there was consensus on

[1317] Erik B. Bluemel, 'The Implications of Formulating a Human Right to Water', (2004) 31 Ecology Law Quarterly 968.
[1318] See Erik B. Bluemel, 'The Implications of Formulating a Human Right to Water', (2004) 31 Ecology Law Quarterly 969
[1319] John Scanlon, Angela Cassar and Noemi Nemes, *Water as a Human Right?* (IUCN Environmental Policy and Law Paper No 51, IUCN, Switzerland 2004) 21
[1320] John Scanlon, Angela Cassar and Noemi Nemes, *Water as a Human Right?* (IUCN Environmental Policy and Law Paper No 51, IUCN, Switzerland 2004) 21.

the inclusion of international cooperation in Article 2(1) due to the need for states with insufficient resources to obtain help under technical assistance or other ways to be able to satisfy the rights included in the ICESCR.[1321] Thus, certain extraterritorial (in the sense of international) scope was intended by the drafters; not being necessary to limit explicitly the protection of the rights to those people residing in the territory of a state party only.[1322] The CESCR, the authoritative interpreter of the ICESCR, has identified the obligations of states that emanate from the ESC rights embraced in the ICESCR. The CESCR has stated, in different General Comments, that states have both national and international obligations, which are classified in the obligations to respect, protect and fulfil. With regard to the right to water the CESCR asserts that the obligation to respect requires states to refrain from actions that directly or indirectly interfere with the enjoyment of the right to water to individuals within their territory or jurisdiction and in other countries.[1323] The obligation to protect means that states need to prevent third parties (individuals, groups, corporations) from interfering with the enjoyment of the right to water, nationally and extraterritorially.[1324] The obligation to fulfil can be disaggregated into the obligations to facilitate, promote and provide. According to the obligation to fulfil, states are required to adopt the necessary measures to contribute to the realisation of this right, including the protection of water resources from pollution and unsustainable extraction. States are also obliged to fulfil this right when individuals or groups are unable, for reasons beyond their control, to realise this right themselves by the means at their disposal.[1325] The international obligations to respect and protect apply simultaneously with the obligations that states have domestically. Only the extraterritorial obligation to fulfil is a subsidiary duty. It applies if the domestic state is unable to fulfil the rights by itself. Since the international obligation to fulfil can be a burdensome duty, this obligation is limited to those states in a position to assist, depending on the availability of resources, which include economic, technical and water resources.

The recognition and implementation of extraterritorial human rights obligations are relevant since states can within their own borders violate human rights in another state. It is widely accepted, at least regarding civil and political rights, that states can be, and have been, held responsible for violations of human rights caused outside their territory mainly when they exercised effective control over a foreign territory (e.g. military

[1321] Michał Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp 2009) 299. See also Sigrun I. Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Intersentia, Antwerp 2006) 85.
[1322] Fons Coomans, Some Remarks in the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights, in Fons Coomans and Menno. T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp 2004) 185.
[1323] UN CESCR, 'General Comment 15, the right to water' (2002), UN Doc. E/C.12/2002/11, paras 21,22, 31.
[1324] UN CESCR, 'General Comment 15, the right to water' (2002), UN Doc. E/C.12/2002/11, paras 23,24, 33
[1325] UN CESCR, 'General Comment 15, the right to water' (2002), UN Doc. E/C.12/2002/11, paras 25-27, 34.

occupation) or over persons located in foreign territory.[1326] A particular situation where states can cause an extraterritorial harm to the human right to water is through the use and management of transboundary watercourses. In this case the harmful act or omission is taking place within the territorial boundaries of a state, but causing harm in another state. For instance, pollution, diversion and overexploitation of an international watercourse caused by an upstream state have a direct impact in downstream states. In a transboundary watercourse the use and management of such resources within the territory of one state can cause an extraterritorial impact in the enjoyment of the human right to water in another state sharing the same watercourse, undermining the role of the latter state acting alone. Therefore, an adequate and cooperative management of international watercourses is necessary.

Since international water law regulates in a cooperative manner the use and management of international watercourses, this study analysed whether international water law may conflict with the realisation of the human right to water or conversely, if it could be used as a tool to support such a right in a transboundary watercourse context. With this purpose, the two instruments that today compile the norms of universal water law were scrutinised: the UN Watercourse Convention and the Berlin Rules. Therein the core principles of international water law, which constitute international customary law, are incorporated: the principle of reasonable and equitable utilisation, the no significant harm rule and the principle of cooperation. After a detailed examination of these instruments we can conclude that international water law is relevant for the recognition and application of the human right to water extraterritorially. Firstly, it is worth noting that international water law establishes obligations between riparian states. Secondly, international water law stipulates that, when determining the equitable and reasonable utilisation of a particular international watercourse a number of factors need to be taking into account. Although there is no hierarchy in those factors, priority must undoubtedly be given to the use of water for vital human needs. The definition given to vital human needs mirrors the needs that the human right to water is aiming to protect.[1327] Thirdly, the Berlin Rules integrate traditional rules regarding transboundary water with international human rights law that apply to all waters, national as well as international. Article 17 of the Berlin Rules incorporates 'the right of access to water', which duplicate almost word by word the definition of the human right to water as adopted in General Comment 15. Additionally, the obligations to respect, protect and fulfil as defined by General Comment 15 are also spelled out in this provision. Given that article 17 applies to both national and international waters, the obligations of states that are

[1326] Coomans, F. and Kamminga, M.T., 'Comparative Introductory Comments on the Extraterritorial Application of Human Rights Treaties', in F. Coomans and M. T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp 2004) 3-4, 43; Talele Soboka Bulto, 'Extraterritorial Application of the Human Right to Water in the African Human Rights System', (2011) 29 (4) Netherlands Quarterly of Human Rights 499. See also Michał Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp 2009).

[1327] The UN Watercourse Convention, Article 10(2); Berlin Rules, Article 14.

included in this article also have a territorial and extraterritorial character. For the aforementioned reasons, we can conclude that international water law strengthens the recognition of the extraterritorial obligations of the human right to water.

There is a close relationship between international water law and the human right to water, given that the core principles of international water law can be used as a tool to support the implementation of the human right to water in a transboundary watercourse context. The principle of equitable and reasonable utilisation requires states to equitably allocate water among the co-riparian states, while giving priority to the satisfaction of the vital human needs of the population dependent on the concerned international watercourse. This principle is interconnected with the international obligation to fulfil the right to water, since states should facilitate the realisation of this right in other countries. An obligation that is more incumbent in those states that are in a position to assist. States sharing an international watercourse are evidently in a position to cooperate with its co-riparian states in the adequate management of a shared watercourse, to set up the conditions to facilitate the realisation of the human right to water of the entire population dependant on a particular watercourse. The no significant harm rule is interconnected with the international human rights obligations to respect and protect. Accordingly, states must refrain from causing significant harm in the utilisation of international waters, as well as abstaining from interfering with the enjoyment of the right to water in other states. Likewise, states have to prevent that third parties operating in international watercourses under their jurisdiction cause a significant harm that end up violating the human right to water in other countries. The obligation to cooperate under international water law is limited to the use and management of an international watercourse and to the riparian states connected to the same watercourse. In contrast, the obligation of assistance and cooperation from human rights is broader, since it is addressed to all states parties to the ICESCR without considerations of proximity or geographical/hydrological connection. This obligation is not only related to the management and use of water resources, but also to the provision of other kinds of cooperation and assistance. All in all we can conclude that the main principles of international water law and the international obligations of the human right to water do not conflict with each other; on the contrary, they are interconnected.

In case there is a violation of the human right to water, effective remedies should be available. This study examined the available mechanisms to obtain redress when the human right to water is infringed extraterritorially. Both international water law and human rights law provide different mechanisms to obtain redress. According to international water law the following mechanism can be used by states to solve a dispute over international waters: 1) a particular dispute settlement mechanism agreed between states; 2) negotiations; 3) good offices of a third party; 4) arbitration; and 5) recourse to the ICJ. Given that the principle of equitable and reasonable utilisation requires riparian state to give priority to the use of water for vital human needs of the population dependent on an international watercourse, a riparian state can initiate an

inter-state mechanism to protect such a preference among other uses. Inasmuch as vital human needs resemble the needs that the human right to water is protecting, those inter-state mechanisms can serve for the purpose of protecting this human right. International water law also incorporates the 'principle of non-discrimination', according to which states shall allow individuals located in another country to have access to judicial or other procedures to initiate a claim concerning significant transboundary harm caused to them by an action or omission carried out in its territory.[1328] Such individuals must receive the same treatment as that afforded by a national of the country where the procedure is initiated. Violation of the human right to water caused by the use and management of international rivers can be interpreted as significant transboundary harm, especially due to the importance of water for human survival, public health and the satisfaction of vital human needs.

In human rights law, mechanisms of redress are also available. The OP-ICESCR provides two mechanisms: inter-state communications and an enquiry procedure. These mechanisms can be initiated by one state party if it considers that another state party is not fulfilling its obligations under the ICESCR or when there is reliable information about grave or systematic violations of ESC rights. However, the application of these mechanisms is limited since both concerned states must have recognised the competence of the CESCR to receive and consider such procedures. Given that neither of these procedures refers to the need for the victims to have been subjected to the jurisdiction of the state party whose conduct is in question, it is considered that these procedures permit allegations of violations of extraterritorial obligations. The OP-ICESCR also enables individuals, under the jurisdiction of a state party, to submit communications claiming to be victims of a violation of the rights set forth in the ICESCR by that state party.[1329] It seems that the expression 'under the jurisdiction', may restrict the scope of the application of individual communications. Although the term jurisdiction has been discussed in relation to other international human rights conventions, there is not yet an agreement on the precise definition of this term in this context. As a result, the possible limitations originated by the inclusion of the term jurisdiction should be clarified. When interpreting the meaning of jurisdiction, the CESCR could take a narrow or a broad approach. If a narrow interpretation is adopted, the CESCR could state that jurisdiction is considered to be confined to the territory of each state party. Therefore, excluding the possibility for individuals to claim the violation of a human right caused extraterritorially. On the other hand, the CESCR could also adopt a very broad interpretation of the meaning of jurisdiction, following for instance the definition provided by the Maastricht Principles on Extraterritorial Obligations, where the notion of jurisdiction includes situations of: 1) authority or effective control; 2) foreseeable effects; or 3) a position to exercise decisive influence or to take measures to realise ESC rights. This approach would allow individuals to obtain

[1328] UN Watercourse Convention, Article 32; Berlin Rules, Article 69.
[1329] OP-ICESCR, Article 2.

redress concerning extraterritorial violations of their right to water. It might be expected that the CESCR will adopt a broad interpretation, since this same body has recognised the extraterritorial states' obligations that derive from ESC rights. It would seem contradictory that the CESCR recognises specific territorial and international states' obligations concerning ESC rights, but that it only enables individuals to seek redress regarding territorial violations, and not in relation to extraterritorial violations of human rights. In any event, if the CESCR is confronted with a claim of an extraterritorial violation of the human right to water, whether in a state-state procedure or in an individual communication, it will be its task to assess the violation of the domestic and extraterritorial obligations of the states involved, since territorial and extraterritorial states' obligations apply simultaneously.

7.3. Overall conclusion

In general, it can be concluded that the human right to water is no longer an emerging right. It has evolved as a fully fledged human right and its recognition is undeniable. This right has been materialised in different regional treaties, General Comment 15, constitutions, legislations and (quasi)jurisprudence of UN treaty bodies, regional bodies responsible for the promotion and protection of human rights and national courts. The human right to water is recognised in two ways: as a derivate right and as an independent right. The explicit incorporation of this right in different national legal systems, particularly in the last decade, shows a growing tendency around the world to recognise the right to water as an independent human right.

The extraterritorial application of the human right to water is extremely important, especially since a large number of rivers, lakes and aquifers are internationally shared, and the capacity of a state to realise this right domestically can be undermined by the extraterritorial (in)actions of other co-riparian states. This study only touched upon the extraterritorial obligations of the right to water in a transboundary water context. However, such obligations are not restricted to the use and management of international watercourses. Based on the findings of this study international water law reinforces the recognition of extraterritorial obligations of the human right to water. Additionally, both human rights law and international water law offer some mechanisms to obtain redress when there has been an extraterritorial violation of the human right to water. Although, international water law does not explicitly refer to such a right, this objective can be achieved by claiming the protection of vital human needs of the population dependent on international waters. Overall, we can conclude that international water law can, and should, be used as a tool to support the human right to water in an extraterritorial watercourse context.

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